

FILED

MAY 10 1990

No. 89-839

In The

JOSEPH F. SPANIOL, JR.
CLERK**Supreme Court of the United States**

October Term, 1989

STATE OF ARIZONA,

Petitioner,

vs.

ORESTE C. FULMINANTE,

*Respondent.***On Writ Of Certiorari To The Arizona Supreme Court****JOINT APPENDIX**

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**PETITION FOR CERTIORARI FILED
NOVEMBER 17, 1989
CERTIORARI GRANTED MARCH 26, 1990**

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Superior Court of Arizona, County of Maricopa

No. CR 142821

Relevant Docket Entries

<u>Date</u>	<u>NR.</u>	<u>Proceedings</u>
Sept. 4, 1984	1	Grand Jury Indictment
Oct. 25, 1985	36	[Defendant's] Motion to Suppress Admissions and/or Confessions
Oct. 30, 1985	38	[State's] Response to Motion to Suppress
Nov. 7, 1985	43	[Defendant's] Reply to Response on Motion to Suppress
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IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA,)	
Plaintiff,	)	NO. CR 142821
vs.	)	56 GJ 322
ORESTE FULMINANTE,	)	INDICTMENT
Defendant.	)	FIRST DEGREE
	)	MURDER,
	)	A Class 1 Felony.

The Grand Jurors of Maricopa County, Arizona, accuse ORESTE FULMINANTE, on this 4th day of SEPTEMBER, 1984, charging that in Maricopa County, Arizona:

ORESTE FULMINANTE, on or about the 13th day of SEPTEMBER, 1982, intending or knowing that his conduct would cause death, with premeditation caused the death of JENEANE MICHELLE HUNT, in violation of A.R.S. §§ 13-1105, 13-1101, and 13-703.

/s/ A True Bill
("A True Bill")

THOMAS E. COLLINS
MARICOPA COUNTY
ATTORNEY

/s/ K. C. Scull
K. C. SCULL
DEPUTY COUNTY
ATTORNEY

SEPTEMBER 4, 1984
Date

/s/ George Eichman
GEORGE EICHMAN
FOREMAN OF THE
GRAND JURY

FRANCIS P. KOOPMAN
1444 North 16th Street
Phoenix, Arizona, 85006
602-256-0757

Attorney for Defendant

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,	:	NO CR-142821
Plaintiff,	:	MOTION TO
-v-	:	SUPPRESS
ORESTE FULMINANTE,	:	ADMISSIONS
Defendant.	:	AND/OR
	:	CONFESIONS
	:	(Oral Argument
	:	Requested)
	:	(Assgd. to
	:	Hon. S. Gerst)

COMES NOW the Defendant by and through his attorney undersigned and hereby moves this Court for an Order suppressing the alleged admission and/or confession made by the Defendant to Anthony Sarivola on October 20, 1983, and allegedly repeated to Donna Sarivola on or about May of 1984. This motion is based upon the Memorandum of Points and Authorities attached hereto.

RESPECTFULLY SUBMITTED this 25th day of October, 1985.

/s/ Francis P. Koopman
FRANCIS P. KOOPMAN
 Attorney for Defendant

MEMORANDUM OF POINTS AND AUTHORITIES
FACTS

THE following facts are admitted solely for the purpose of this argument only and are not to be construed as admission of their validity.

SOME time in April of 1983 Anthony Sarivola, a Mafia associate of the Columbo crime family, approached F.B.I. Agent Walter Ticano and offered to become a paid confidential informant. Thereafter, Sarivola was incarcerated at the Federal Correctional Institution at Ray Brook, New York. The Defendant was already a prisoner thereat.

ON October 20, 1983, Agent Ticano met with Sarivola at the prison to obtain information relating to prison personnel. During this briefing, Sarivola told Ticano he "thought" that Fulminante may have killed a girl in Arizona. Ticano told Sarivola he had to come up with stronger information than just his own beliefs and advised Sarivola to do some more work on Fulminante. Later that day (according to Ticano and substantiated by F.B.I. reports), Sarivola called Ticano and told him that he had gotten Fulminante to confess to the murder of his step-daughter. (In an interview with the undersigned, Sarivola states that the confession and subsequent call to Ticano took place several days later.) Sarivola admits that he purposely interrogated Fulminante about the murder in order to develop information for the F.B.I and that, in return for Fulminante's admission to him, Sarivola would

give Fulminante his personal protection from any harm by other prisoners.

SARIVOLA was released from prison some time in November of 1983 and kept in contact with Fulminante. When Fulminante was released from prison in May of 1984, he was allegedly driven to Pennsylvania from new York by Sarivola who was accompanied by his wife, Donna Sarivola. During this ride, Donna Sarivola questioned Fulminante about his family in Arizona and through continued questioning over a period of one half hour allegedly got Fulminante to admit to the rape and murder of his step-daughter. Anthony Sarivola was still a paid confidential informant for the F.B.I at that time.

LAW

UNLESS law enforcement officers advise defendant in custody of Miranda rights before questioning him, any statement made by person in custody is inadmissible against him at trial even though the statement may in fact be wholly voluntary. U.S.C.A. Const. Amend. 5 & 6, A.R.S. Const. Art. 2, Sec. 10; *State v. Montes*, 136 Ariz. 491, 667 P.2d 191; *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602. In the case at hand, Defendant Fulminante was incarcerated at Ray Brook Prison during his F.B.I. encouraged interrogation by Anthony Sarivola, a paid informant and agent of the government, whose sole and admitted purpose at that time was to get Fulminante to confess to the homicide in order to assist the F.B.I in its investigation. During an interview of F.B.I. Agent Ticano on October 21, 1985, Agent Ticano corroborated this set of events. At no time was Fulminante advised of his *Miranda* rights.

"AT this point it should be emphasized that law enforcement officials have the right, and indeed the obligation in the prosecution of crime to use all information that comes into their hands pointing to the guilt of an accused. This is true even though the persons supplying that information may harbor expressed or unexpressed motives of expectation of lenient treatment in exchange for such information. It is only when the state actively enters into the picture to obtain the desired information in contravention of constitutionally protected rights that the sanction of inadmissibility become pertinent. It is not that the information is any less material or valuable to the finding of truth, it is the concept that *the state's overriding of an individual's constitutionally-based rights will not be tolerated.* In this arena of contesting interests, i.e., where probative evidence and individual rights become mutually exclusive, our courts have decreed that *individual rights must prevail.*" *State v. Smith*, 107 Ariz. 100, p.103; 482 P.2d 863. (Emphasis added)

THE undersigned submits that, based on the facts and the law submitted, the October 20, 1983, alleged admission/confession must be suppressed. The question then arises whether the subsequent admission/confession allegedly made in May of 1984 to Donna Sarivola in the presence of Anthony Sarivola while Fulminante was no longer incarcerated is also inadmissible. The undersigned submits that the answer is "yes" based on the principles of the fruit of the poisonous tree doctrine (see *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407).

WHILE admittedly Donna Sarivola was not an agent of the government at the time of the second interrogation and Fulminante was not in custody, it is obvious that, if

indeed Fulminante made incriminating statements, it was because he was aware that Anthony Sarivola allegedly already knew about his misconduct and therefore he had no reason to hide anything from either of the Sarivolas. Anthony Sarivola substantiated this line of thinking on the part of Fulminante during an interview conducted on October 22, 1985.

IT should be further noted that when Fulminante made his first alleged confession to Anthony Sarivola, it was based on Sarivola's promise to protect Fulminante and prevent any reprisals against him because of his involvement in the death of the child. Fulminante obviously relied on those promises and continued to rely on those promises when he made his second statement to Donna Sarivola. A confession induced by direct or implied promise, however slight, is involuntary (see *State v. Hensley*, 137 Ariz. 80, 669 P.2d 58). The Court, therefore, must determine whether the second confession was the product of an essentially free and unconstrained choice by Fulminante or whether his reliance on the promise of protection by an alleged Mafia representative overcame his will and his capacity for self-determination was critically impaired. (See *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041) Confessions are *prima facie* involuntary and burden is on state to show that they were freely and voluntarily made and that they were not the product of physical or *psychological* coercion. *State v. Schad*, 129 Ariz. 557, 663 P.2d 366; *State v. Gretzler*, 126 Ariz. 60, 612 P.2d 1023.

WHEREFORE, based on the foregoing, the undersigned respectfully moves this Court for an Order suppressing any and all statements, whether confessions or

admissions, made to either Anthony or Donna Sarivola, for the reasons that the first statement was in violation of *Miranda* and both statements were involuntary and untrustworthy, and/or the second statement was the fruit of the poisonous tree.

RESPECTFULLY SUBMITTED this 25th day of October, 1985.

/s/ Francis P. Koopman
Francis P. Koopman
1444 North 16th Street
Phoenix, Arizona, 85006
602-256-0757
Attorney for Defendant

Original of the foregoing
filed this 25th day of
October, 1985, with:

Clerk of the Superior Court
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Phoenix, Arizona, 85003

Copy of the foregoing ~~mailed~~/
hand-delivered this 25th day
of October, 1985, to:

The Honorable Stephen Gerst
Judge of the Superior Court

K. C. Scull
Deputy County Attorney

/s/ Francis P. Koopman
FRANCIS P. KOOPMAN

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA,)
Plaintiff,	) NO. CR 142821
vs.)
ORESTE FULMINANTE,	) RESPONSE TO
Defendant.	) MOTION TO
	) SUPPRESS
	) (Assigned to the
	) Honorable
	) Stephen Gerst,
	) Div. 42)

COMES NOW the State of Arizona, by and through undersigned deputy, and urges the Court to deny defendant's Motion To Suppress based upon the Memorandum of Points and Authorities attached hereto.

Respectfully submitted this 30th day of October,
1985.

THOMAS E. COLLINS
MARICOPA COUNTY
ATTORNEY

BY /s/ K.C. Scull
K.C. Scull
Deputy County Attorney

MEMORANDUM OF POINTS AND AUTHORITIES

FACTS:

The defendant has submitted a statement of facts for purposes of arguing his motion. The State takes issue with some of the assumptions made by the defendant. It is a fact that Anthony Sarivola was at all times pertinent to this case a paid confidential informant for the F.B.I. He was an informant in matters that related to organized crime in the Brooklyn, New York City area. It is also true that while incarcerated in Raybrook Prison in upstate New York various rumors reached Mr. Sarivola that Oreste Fulminante had killed his step-daughter in Arizona.

Initially these were rumors and initially the truth of the rumors was denied by the defendant. It is also true that Mr. Sarivola passed the rumors on to the F.B.I. Upon being informed of those rumors, the F.B.I Agent, Mr. Walter Ticano, supposedly said " . . . that's just a rumor, you'll have to find out more about it . . ." before I can act upon it, or words to that effect. The witness, Anthony Sarivola, went back to the defendant and asked him if these rumors were in fact true adding that he, Mr. Sarivoia, might be in a position to help protect the defendant from physical recriminations in prison, but that the defendant must tell him the truth. Thereupon the defendant told Mr. Sarivola that he, in fact, had killed his step-daughter in Arizona, and gave him substantial details about how he killed the child. At no time did the defendant indicate he was in fear of other inmates nor did he ever seek Mr. Sarivola's "protection".

The defense attorney in this case is characterizing the discussions between Mr. Sarivola and the defendant, Oreste Fulminante, as "interrogations" and several times refers to the fact that Sarivola "questioned" the defendant and "got" the defendant to admit to the crimes. It is the State's position that that characterization is inaccurate. Mr. Sarivola spoke to the defendant in conversational tones about what he had or had not done to his step-daughter.

The defendant was not incarcerated for the crime of killing his step-daughter. The defendant was not under arrest and was not a suspect as far as Mr. Sarivola and the F.B.I. were concerned. The F.B.I. and Mr. Sarivola had no supporting corroborative facts concerning the commission of any crimes in Arizona. They did not at that point even know that a homicide had taken place in Arizona. Their inquiries were more to satisfy their curiosity and had definitely not risen to the dignity of a criminal investigation. The F.B.I. had no jurisdiction to prosecute any such crime if in fact there was one. Certainly they had no probable cause to seek the arrest of the defendant for this crime. This was not a forced investigation and was certainly not a police interrogation in any sense. The witness Sarivola could not be characterized as an "agent" for the Mesa Police Department as before any such agency can exist it is fundamental law that the principal must know of the existence of its agent and somehow clothe it with authority of some kind. The Mesa Police Department did not know of Mr. Sarivola's existence, nor he theirs.

There was no reward promised or forthcoming to the witness Sarivola for his actions in regard to Oreste Fulminante. The F.B.I. was paying Mr. Sarivola for information

that he gathered for them which they could corroborate and which they could prosecute or do something about. Obviously they could not prosecute or corroborate any of the facts as concerned in an Arizona homicide. The Mesa Police Department had at that time promised the defendant nothing as far as reward or monies of any kind. Since that time, due to the expense involved in interviews in various parts of the country, and because the witness is in the Federal Witness Protection Program and is in a secret location, the Mesa Police Department has given the defendant approximately six hundred dollars (\$600.00) for necessary incurred expenses in connection with the four separate interviews in various parts of the country. The defendant was in no way forced or coerced, nor were his constitutional rights overridden or were any of his statements involuntary, because he did not have to talk to the witness, Anthony Sarivola, at any time. He was not under Mr. Sarivola's custody or control and could have walked away from him at any time while they were incarcerated at Raybrook Prison.

The defendant has cited several cases including the famous *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602. In the *Miranda* case the Court states that the so called "Miranda Warnings" are required prior to "custodial interrogation of a suspect."

By custodial interrogation we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.

In this case the questioning was not initiated by a law enforcement officer. The defendant had not been taken

into custody or otherwise deprived of his freedom of action because of anything to do with this case. He was not held incommunicado. Therefore, 'Miranda' does not apply.

The defendant also feels that the testimony of Donna Sarivola, who heard a subsequent confession by the defendant, should be suppressed. First of all, he argues, because of the "fruit of the poisonous tree doctrine," which in the State's opinion is absolutely not involved in this case. There is no "poisonous tree" and there is no "fruit." In other words, there is no illegal search or arrest or illegal confession and there is absolutely no logical connection between that confession and a later confession by the defendant to Donna Sarivola, the wife of Anthony Sarivola.

Donna Sarivola was not an agent of the government at any time, nor did she even know that her husband was an informant for the government at the time that Mr. Fulminante confessed to her. The defendant was not "interrogated" by Donna Sarivola at any time. He spoke freely and voluntarily about his involvement with the crime in Arizona. She simply asked him if he had family and why did he not go to his family upon his being released from prison. The defendant freely chose to confess his full involvement at that time. The presence of Anthony Sarivola at that time is totally innocuous. Mr. Sarivola has said at various interviews that he was paying little or no attention to the conversation that his wife was having with the defendant, Fulminante. There was certainly no threat from Mr. Sarivola, expressed or implied. There was certainly no reason for Mr. Fulminante to be relying on any promises that Mr. Sarivola may

have made to defendant Fulminante regarding protection from physical recrimination by fellow prison inmates. This confession did not occur in prison. For the defendant attorney to say at the bottom of page 5 that the defendant Fulminante "obviously relied on those promises and continued to rely on those promises when he made his second statement to Donna Sarivola" is ludicrous.

The defendant has absolutely failed to show any physical or psychological coercion or anything that would go to the voluntariness of the defendant's statements.

The defendant has cited several cases and I wish to respond to some of them starting with the case of *State v. Montes*, 136 Ariz. 491, 667 P.2d 191. The defendant has cited this case as apparently supporting his proposition concerning the inadmissibility of certain statements. In the *Montes* case the statement was held to be admissible.

The defendant has quoted at length on page 4 of his motion from *State v. Smith*, 107 Ariz. 100 at page 103; 482 P.2d 863. It should be pointed out to the Court that this case involves what is known as the "Massiah" situation. *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed. 2d 246 (1964); and *United States v. Henry*, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed. 2d 115 (1980). In the *Messiah* and *Henry* cases the Court is extremely clear that the right to counsel arguments under the Sixth Amendment to the United States Constitution are triggered by the Indictment of the defendant for the charge at issue.

In other words, had Oreste Fulminante been indicted for the murder of his step-daughter and been incarcerated his rights to counsel would have attached under

Massiah and *Henry* and therefore no in custody interrogations by agents or fellow inmates or police officers would have been allowed without him having the right to have his counsel present or his counsel's advice. While making this perfectly clear in *Massiah* and *Henry* the Court went on to state in *United States v. Ammar*, 714 Fed.2d 238 (3rd Cir. 1983);

"It is clear from the Supreme Court's statements that the Sixth Amendment right to counsel as enunciated in *Messiah* and *Henry* does not extend to the pre-indictment period" at page 261.

In our own state, *State v. Ortiz*, 131 Ariz. 195, 639 P.2d 1020 (1981), the defendant was in custody and indicted for murder. While he was in jail the defendant confessed the murder to a cell mate and also asked the cell mate to help him murder witnesses against him. Upon release the former cell mate called the defendant while he was still in jail and had the conversation recorded. The Arizona Supreme Court found that *Messiah* and *Henry* were not controlling because the defendant had not been indicted for the new crime of conspiracy to commit murder. Thus the taped conversation was admissible at trial. However, the Court did note that the taped conversation could not be used to prove guilt on the original charge of murder for which the defendant was indicted and incarcerated.

Defendant also cites *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407. This case involved an illegal arrest and subsequent statements made by the defendant which obviously should be suppressed as "fruits of the poisonous tree" but there is nothing to indicate that statements made to Donna Sarivola subsequent to statements made to Anthony Sarivola is in any sense a "fruit of the

"poisonous tree". It is not and *Wong Sun* can be excluded from consideration in this case.

In *State v. Hensley*, 137 Ariz. 80, 669 P.2d 58, the Court held that even though a defendant's confession might be obtained in violation of the *Miranda* decision, the confessions could still be voluntary. Even if they were erroneously admitted it did not necessarily mandate a reversal if there was overwhelming evidence of guilt from other sources. The decision in this case is not particularly helpful to any determination of any of the issues in the case at bar.

In *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, the defendant was stopped for a traffic violation and certain evidence was uncovered. The police authority argued that the defendant had freely given a consent to search. The defendant arguing that he did not know that he could refuse to consent to a consent search. Again, the case simply has no bearing on the issues presently before the Court.

State v. Schad, 129 Ariz. 557, 663 P.2d 366, is another case cited by the defense attorney. The Court held there was no agency relationship between the informant and the police because the informant initially contacted the police and was not promised gain or early release from prison. More importantly, there was no concerted action on the part of the police which was aimed at priming the informant to be a witness against the defendant at trial.

The defendant has cited *State v. Gretzler*, 126 Ariz. 60, 612 P.2d 1023, but it is a little difficult to determine from reading *Gretzler* how it supports the defendant's position.

There is a discussion in *Gretzler* that concerns voluntariness of confessions and the Court says it will consider the three following factors to determine voluntariness: (1) impermissible conduct by police; (2) coercive pressures; (3) confession derived from prior involuntary statement. It is submitted by the State that none of these issues have been raised in this case to the extent that they need to be responded to.

The State wishes to bring to the Court's and counsel's attention the case of *Hoffa v. U.S.*, 385 U.S. 293. This case involved the notorious Jimmy Hoffa and his famous conviction for jury tampering. All the time Hoffa was scheming to bribe jurors he had, unbeknownst to him, a paid informer in his ranks. The Court said,

" . . . we proceed upon the premise that Partin was a government informer from the . . . and that the government compensated him for his services as such."

The informant in Hoffa did not use force or stealth and was not a surreptitious eavesdropper. He was with Hoffa by invitation and

" . . . every conversation which he heard was either directed to him or knowingly carried on in his presence. The petitioner, in a word, was not relying on the security of the hotel room; he was relying upon his misplaced confidence that Partin (read Sarivola) would not reveal his wrongdoing."

"Neither this Court nor any member of it had ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing with will not reveal it. Indeed, the Court unanimously rejected that

very contention less than four years ago in *Lopez v. United States*, 373 U.S. 427, 83 S.Ct. 1381, 10 L.Ed. 2d 462."

A dissenter in *Lopez* (*supra*) said:

"The risk of being overheard by an evesdropper or betrayed by an informer or deceived as to the identity or one with whom one deal is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak."

The Court has consistently held that

" . . . a necessary element of compulsory self-incrimination is some kind of compulsion," *Hoffa* *supra* and *U.S. v. Reynolds*, 762 F.2d 489 (1985).

Lastly, in *Reynolds* but regarding "custody" approval from *Windsor v. U.S.*, 389 F.2d 530 (5th Cir. 1968) as follows:

"The prime inquiry is into the existence of probable cause. . . . The existence of probaable cause establishes "custody." Any other rule would permit the frustration of Miranda's commands."

In the case at bar the defendant was not in "custody" as meant by Miranda.

Therefore, the State having responded to the defendant's Motion for Suppression of Admissions and/or Confessions, respectfully requests that the Court deny same.

Respectfully submitted this 30th day of October, 1985.

THOMAS E. COLLINS
MARICOPA COUNTY
ATTORNEY

BY/s/ K.C. Scull
K.C. Scull
Deputy County Attorney

Copy of the foregoing
mailed/delivered this
30 day of October,
1985, to:

The Honorable Stephen Gerst
Judge of the Superior Court

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Attorney at Law
1444 N. 16th Street
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BY K.C. Scull
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Attorney for Defendant

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA
THE STATE OF ARIZONA, : NO. CR-142821
Plaintiff, : REPLY TO
-v- : RESPONSE ON
ORESTE FULMINANTE, : MOTION TO
Defendant. : SUPPRESS
: (Assgd. to
: Hon. S. Gerst)

SUPPLEMENTAL MEMORANDUM OF
POINTS AND AUTHORITIES
FACTS

Mr. Scull goes to great length to attack my analysis of the facts leading up to the original admissions of Fulminante to Sarivola. To support my statement of facts, I hereby submit portions of interviews taken by me on October 21, 1985, of Agent Ticano and Anthony Sarivola at which Mr. Scull was present.

A pertinent portion of Walter Ticano's Interview is attached hereto as Exhibit "A".

A pertinent portion of Anthony Sarivola's Interview is attached hereto as Exhibit "B".

LAW

The rule of *Miranda v. Arizona*, 384 U.S. 456, 16 L Ed 2d 694, 86 S Ct. 1602, 10 ALR3d 974, that a person taken into custody or otherwise deprived of his freedom by the authorities in any significant way must, before being subjected to questioning, be given warnings about his right to be silent and his right to have a lawyer, applies not only to questioning one who is in custody in connection with the very case under investigation, but also to questioning a person who is in jail for an offense entirely separate from the one under investigation. *Mathis v. United States*, 391 U.S. 1, 20 L Ed 2d 381, 88 S Ct. 1503.

Therefor, based upon all the facts presented Fulminante was entitled to his Miranda warnings at the time of his first alleged confession to Sarivola.

The State further seems to allege that Sarivola did not actually question Fulminante but had a "conversation" with him. Apparently the counsel for the State is not familiar with the standard set first in *Brewer v. Williams*, 430 U.S. 387, 97 S. Ct. 1232, 51 L Ed 2d 424 (1972) which states that any conduct deliberately and designedly pursued to elicit information is viewed the same as if it were a formal interrogation.

Mr. Scull appears to argue that even if this conduct was improper and unconstitutional, it should not be held against Maricopa County or the City of Mesa in their attempt to introduce this evidence against Fulminante since they were not a party to the interrogation nor did they know such activity was taking place. The U. S. Supreme Court threw out that argument in 1961 in the

landmark case of *Mapp v. Ohio*, 367 U.S. 643, 81 S Ct. 1684, 6 L Ed 1081 when it stated:

"Federal-State cooperation in the solution of crime under constitutional standards will be promoted, if only by recognition of their now mutual obligation to respect the same fundamental criteria in their approaches."

Denying shortcuts to only one of two cooperating law enforcement agencies tends naturally to breed legitimate suspicion of "working arrangements" whose results are equally tainted. *Byars v. United States*, 273 U.S. 28; *Lustig v. United States*, 338 U.S. 74.

The Defendant stands on all his prior arguments and submits that Mr. Scull's attempt to infuse Massiah, Henry and Hoffa arguments into this case is done solely to confuse and cloud the issues and these cases have nothing to do with the facts or argument in this case.

RESPECTFULLY SUBMITTED this 5 day of November, 1985.

/s/ Francis P. Koopman
Francis P. Koopman
1444 North 16th Street
Phoenix, Arizona, 85006
602-256-0757
Attorney for Defendant

Original of the foregoing
filed this 5 day of
November, 1985, with:

Clerk of the Superior Court
201 West Jefferson
Phoenix, Arizona, 85003

Copy of the foregoing ~~mailed~~/
hand-delivered this 5 day
of November, 1985, to:

The Honorable Stephen Gerst
Judge of the Superior Court

K. C. Scull
Deputy County Attorney

/s/ Francis P. Koopman
FRANCIS P. KOOPMAN

EXHIBIT A

FBI and could be lying through her teeth and I'm not going to know it because you folks won't tell me, I you know.

WT: That's our policy and all I can say is that question is best directed to her and if you feel there are grounds to be pursued you'll have to pursue them with her. I can only pass on at this time the policy of the FBI.

FK: Okay.

WT: Do you see any (inaudible).

LW: No, that's fine.

KCS: Well I think it's akin to asking her if she's part of the Federal Witness Protection Program and you can't ask that question cause they aren't gonna tell you the answer.

FK: Well I won't go into that with you cause I don't really care about that. Okay, how about when you received the original information concerning Fulminante's alleged admission to Saravola on or about October the 20th of 1983, correct?

WT: Correct.

FK: What did you do with that information insofar as the Mesa Police Department and Maricopa County Attorney's Office is concerned?

WT: Okay, first of all it was prior to October 20th in a telephone conversation with Tony in which he indicated that there's a guy up here that's killed this kid and I said to him I don't know anything about it find out what it's about.

FK: Okay.

WT: Now, I think it was October 20th is the day that I actually went to Raybrook on an unrelated matter and sat down with Tony and had a discussion. At that time he gave me a little bit more about it and I said look I gotta know the whole story get me the whole story.

FK: Okay.

WT: Ask him what it's all about and then I get that information by telephone that night. Those documents may be a little bit misleading about the dates because I was traveling up there, I was actually there and then there was a subsequent phone call in addition to that so.

FK: Okay.

WT: The dates are off by maybe a day, I'm not even sure. That's a hazy thing but I don't recall the exact date because the

* * *

EXHIBIT B

PORTION OF TAPED INTERVIEW

STATE -v- ORESTE FULMINANTE

PERSON INTERVIEWED: **ANTHONY SARIVOLA**

FPK: Francis P. Koopman

AS: Anthony Sarivola

FPK: Prior to doing that or on the date that you talked to Walt, did Walt ask you to see how much information you could get out of Fulminante concerning that homicide?

AS: No he didn't pressure me at all.

FPK: He didn't ask you - he wasn't concerned about Fulminante at all?

AS: How could he be concerned if he didn't know what it was?

FPK: Lets back up a little bit - you just get through telling him that Oreste Fulminante

AS: I did not say that he killed his daughter, I says - I think from what he says that he might have done it.

FPK: Okay.

AS: Now, thinking is conjecture

FPK: Okay.

AS: Admitting is doing it

FPK: Okay.

AS: Okay? The man has always been very precise that I work with – Mr. Ticano.

FPK: Mr. Ticano, Okay.

AS: If he's going to lean on somebody, if he's gonna do something, he wants to know what he's doing.

FPK: Correct.

AS: He's not an asshole and he does not walk around acting like one.

FPK: Okay.

AS: He's very professional – Okay? When he has to do something he wants to know who, what, when, why, how and what time the guy went to the bathroom.

FPK: Right.

AS: And that's when he'll do something about it – it lasted that long – there was no rush – be sure before you move.

FPK: Okay.

AS: Okay? He drove it into me and I was always sure before I made any move.

FPK: Okay.

AS: Because regardless of what you believe – all snitches – "your quote" – okay – are not assholes.

FPK: Okay – well I haven't called you an asshole Tony. Now lets go back to your conversation with Walt Ticano on October 20th when you told him about Vince DeMarco and Oreste Fulminante and you indicated to him that you think that Oreste might have killed his step-daughter out in Arizona.

AS: Correct.

FPK: Walt being the precise, hard working, professional F.B.I. Agent that he is, says to you – before I start writing up any reports, or words to that, before I start writing up any reports or asking or telling people to investigate this further – you're gonna have to get me more information from Fulminante.

AS: He was always that way.

FPK: Okay – (Another voice) What exactly did Walt say to you?

AS: Anytime I ever brought him anything, okay, and I don't remember his exact words that day – cause when they did get me, if you remember correctly, I was in the dentist's chair and I had a tooth half hanging out of my mouth and they dragged me out of the dentist's chair to bring me upstairs.

FPK: Okay.

AS: Okay? He said his usual manner "get me what you can or something I can sink my teeth into."

FPK: Alright.

AS: Okay? It had to be that way or he didn't look at it.

FPK: Alright. Now, several days later . . .

AS: Several days later, okay . . .

FPK: You now have a conversation with Fulminante . . .

AS: Okay . . .

FPK: Out in the yard, I believe?

AS: On the walking track.

FPK: Alright. And, what exactly . . .

AS: -We walked every night after dinner . . .

FPK: Alright. And, would it be fair to say that on this particular night your time was running short?

AS: No, his time was running short.

FPK: Well you got out before him, didn't you?

AS: That doesn't mean his time wasn't running short - his time to keep walking around was running short.

FPK: I'm talking about getting out . . .

AS: No, he would have got out - but it wouldn't have been the way I got out - he would have went out of the prison horizontally.

FPK: Why is that?

AS: Because most organized crime figures and most criminals who have some sort of scruples, regardless of what most people believe; and children is a

very soft point except for animals and ah the more the story began to be talked about and get around the joint a lot of people were thinking of hurting the little gentleman.

FPK: Okay.

AS: And he sort of needed somebody to back him up and help him ----- (can't make out) ----- people were starting to avoid him and treat him like shit.

FPK: Okay - so at this point - this is the point in time when you take him out or you meet him on the walking track or you go out on the walking and have a conversation with him . . .

AS: That's correct.

FPK: And, you began to question him about his involvement?

AS: No, I didn't begin to question him about his involvement, what I told him, "if you want my help you're gonna have to be straight, if you're not straight then fuck you."

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA
THE STATE OF ARIZONA,)
Plaintiff,) No. CR-142821
vs.)
ORESTE C. FULMINANTE,)
Defendant.)

Phoenix, Arizona
November 7, 1985
2:35 o'clock p.m.

BEFORE: THE HONORABLE STEPHEN A.
GERST, JUDGE

PRETRIAL CONFERENCE

* * *

(p. 21) THE COURT:

* * *

(p. 22) All right. I have received a motion to suppress admissions and/or confessions, response to motion to suppress, and reply to motion to motion to suppress.

Do I have the date on the memorandum?

MR. KOOPMAN: Yes, Your Honor.

THE COURT: All right. You may proceed.

MR. KOOPMAN: Thank you, Your Honor. Your Honor, before I start, let me state for the record that although, for purposes of argument, we are adopting the facts as stated by the State in their response, because they

do not differ in any manner from the statement of facts, which I put in my original motion, except perhaps the terminology, the use of the word interrogation instead of conversation; and word of custodial interrogation, instead of talking to someone while they were in jail, I think we are down to semantics, and there is really no - no difference between my interpretation of the facts and Mr. Scull's interpretation of the facts.

However, Your Honor, I would also like it noted that in no way are we admitting that those are true facts. They are admitted solely for the purpose of legal argument and not that we are admitting that any confession was ever made to Sarivola or to his wife, Donna, (p. 23) and that issue, if Your Honor does not support my motion, will be taken up at trial, of course, when we get to the credibility of witnesses.

* * *

(p. 26) On the date October the 20th, 1983, when Mr. Fulminante allegedly confessed in the courtyard of Raybrook Federal Detention Prison in New York State, he was in custody. He was in jail.

* * *

(p. 27) The next question is, was he interrogated? All right. The State admits Sarivola was a paid confidential informant of the FBI working for the FBI at Raybrook Prison at that time.

They also admit in their statement of facts that prior to October the 20th, Sarivola had called Agent Ticano and told him that, "There is a fellow up here that, rumor has it, that he killed some girl in Arizona."

The FBI agent told him, "Well, I can't go on rumors. I can't do anything with that information," or words to that effect, "Get me some more solid information from this guy."

Sarivola, on October the 20th, has another conversation in the daytime with Agent Ticano.

Ticano once again tells him, "You've got to get me better information on Fulminante. I can't use simple rumors or guessing."

Sarivola then tells us in his interview that he took a walk with Oreste around the perimeter of the interior of the prison, and during a walk, he tells to him, Oreste, and again, I'm trying to remember the exact wording, and if it's not exactly the wording, it is not (p. 28) done purposely; "Oreste, I'm tired of listening to your bullshit about how that girl died. I want to know the truth. If you want my protection, you better tell me the truth," and, Your Honor, this is his words, "Or get fucked."

That's what Sarivola told Fulminante, and it's on tape and it's part of the documents in this case.

Fulminante then allegedly tells or makes a confession or admission, whatever you want to call it, Judge, whether it's an admission or confession doesn't really matter I think for our argument, Fulminante then allegedly tells Sarivola this story that he - I think the terminology he used was, "Whacked a girl" or, "Whacked his daughter in Arizona."

When asked what the terminology "whacked" means, Sarivola answered, "Killed."

The question now is, was that interrogation, Your Honor, by a law enforcement agency, and I submit to you that there is no doubt - I don't care what case we look at. Let's look at Brewer vs. Williams, a landmark case, which was right on point where they state that any conduct designed to elicit a confession or an admission is interrogation; any conduct, Your Honor, and you know what, in Mr. Scull's argument where he relates to Messiah and Henry, if I can refresh Your Honor's recollection about (p. 29) Messiah, that was where the FBI had an informant, a paid informant got in a car that was bugged with Messiah out of custody and elicited from Messiah admissions concerning his involvement in a particular crime for which he was already under indictment.

Now, Your Honor, again I am not talking about the Sixth Amendment. What I'm talking about is the Fifth Amendment.

At this point, when they talk about post-indictment, they were referring to the Sixth Amendment, but they went on further to say under Messiah, is that interrogation, so that we can now look at the Sixth Amendment, and they said, "Yes, because even though the informant did not specifically ask Messiah pertinent questions about the robbery and simply try to elicit from him some responses, the fact of the matter is, the whole conduct of that conversation was guided toward getting Messiah to make admissions; therefore, it's an interrogation."

The same thing is stated in the Henry case, which the State has alluded to, and in that particular case, that was where the FBI even put in an affidavit with the Court saying that when they sent Nickleson in to question

Henry in jail, they told Henry - I'm sorry; they told Nickleson, "Do not question him. Let him do the talking."

(p. 30) The Court in that case said, "Hey, the man was in custody. The man was under pressure. He had no one else to talk to."

Nickleson went through specifically to see if he could get Henry to talk to him.

Henry did talk to him. We find that to be police interrogation, because Nickleson was a paid police agent, he said specifically to Henry to get the information, and therefore, it's an interrogation for legal purposes.

Your Honor, now, it may have just been in conversation as Mr. Scull says concerning my client's conversation with Sarivola, but legally, under Miranda, it's an interrogation.

So now we have reached two thresholds. We have reached the threshold of custody, and we have reached the threshold of interrogation, custodial interrogation.

Miranda must be given; otherwise, the confession must be suppressed and, Your Honor, that is what you must do in this case.

That was an illegal confession. Now, we have got to look to see whether it was voluntary or involuntary, and if it was involuntary, then it might also be untruthworthy.

All of these - By the way, all of these (p. 31) are found in Miranda, Your Honor, all of these definitions.

Case law, or our own cases state that you cannot use threats of force or violence or promises in order to elicit a

confession, and if you do, such a confession is untrustworthy, because people are liable to say anything.

"Hey, Fulminante. Tell me the truth, and I will let you go free." Fulminante will tell me anything.

THE COURT: You're not arguing Miranda now, you're just arguing voluntariness and -

MR. KOOPMAN: In terms of trustworthiness and the reason I'm saying that, Your Honor, is because we are now going to get to a second confession, and that's an important part of this conversation.

Sarivola is going around the prison allegedly telling everybody that he is a highly placed person in the Columbo crime family, and he is also associated in some way with the Gambino crime family.

He alleges in documents that have been sent to me by the FBI, which he reported to the FBI on October the 20th, 1983, prior to making his report about Fulminante, that he was the member of a five-person crime commission at Raybrook, and that he was so powerful and this commission was so powerful, that they were able to give permission for hits outside the prison.

(p. 32) This is the man that now comes to Mr. Fulminante and says, "Red, if you want my protection, if you want the protection of the Columbo crime family, if you don't want me to walk away from you and let these other guys take care of you for being a child killer, you better tell me the truth about how you killed that girl."

Now, he doesn't say, "How you killed that girl," but that's what he wants to hear.

And he says, "If you don't tell me the truth about how you did it to that girl, I'm not going to help you."

Now, Judge, you can look at it as a threat, "Don't help me, you lose the blessing of the Columbo crime family," or you can look at it as a promise, "Tell me you killed the girl, and I will give you the protection of the Columbo crime family."

I don't care which way you look at it. Either way, there was either a threat or a promise in order to elicit that alleged confession on that particular night during that custodial interrogation.

The reason I bring that up, Judge, is almost – that was October 20th of 1983.

Sometime in May of 1984, Donna Sarivola alleges that Mr. Fulminante had just been released from (p. 33) prison that day and Tony Sarivola happened to be out of prison for some time, had driven to the bus station to pick Fulminante up.

He now drives Fulminante over to Brooklyn and they pick up Donna, and they are now heading for the Pennsylvania area where they are going to drop him off at another former prisoner's house who had gotten – who got Mr. Fulminante some work in a liquor store.

During the ride from Brooklyn, New York, to Pennsylvania, according to Donna Sarivola, she has a conversation while Anthony Sarivola is driving the vehicle.

Mrs. Sarivola has a conversation with this man who had just gotten out of prison, jail that day, whom he has never met before in his whole life, but she's the wife of

the man who has promised protection of the Columbo crime family.

And she says, "Hey, what are you going down to Pennsylvania for? Don't you have any family?"

And at that point in time, Mr. Fulminante is alleged to have said, "Well, I can't go back, because I murdered a girl in Arizona," and then went into great detail with this stranger about how he had committed this crime, which according to Anthony Sarivola was a basic representation of what Fulminante had told him that night in the courtyard in Raybrook.

(p. 34) And I say to you at that point, Your Honor, you then have to look at Wong Sun vs. The United States, because the original confession or admission taken illegally, involuntarily, and untrustworthy at Raybrook was the truth. That confession was the truth of that illegality, that violation of Miranda.

It is now repeated in front of the person who originally received it. For what purpose, Your Honor, because it was untrustworthy?

What is he supposed to do at this point in time, lie to the woman or change his story?

Lie, according to whatever Sarivola would believe. Change his story? No, he's riding with this big shot from organized crime.

THE COURT: Would he not say anything?

MR. KOOPMAN: Well, that's easier said than done, Your Honor.

Again, we are going by what – I'm going by what the Sarivolas are saying and not what my client might say on the stand.

In other words, Your Honor, I will put it out in the open. My client says he has never spoken about Arizona to Mrs. Sarivola under any circumstances, and the only conversation he had with Anthony Sarivola was to tell him how he was under investigation out here, which anybody (p. 35) reading the Mesa Tribune can find out, but be that as it may, sir, my argument is, we now have the fruit of the poisonous tree, him coming forward, making a statement again in front of the person who had originally brought out this illegal, or improper, involuntary, untrustworthy statement.

We then go on to the last argument of the State in their response to my motion, and that is, they say, "Well, Judge, let's say Koopman is right. Let's say Miranda was violated. Let's say Wong Sun might have been violated. What difference does it make? The Mesa Police Department doesn't have anything to do with it.

The Maricopa County Attorney's Office doesn't have anything to do with it; therefore, we should be allowed to use it.

It isn't our fault the FBI screwed up," and apparently, again, the county attorney has not read the case law from the United States' supreme court, which goes back to the 1961 case of Mapp vs. Ohio, and goes on to Byars and Lustig where they say, "Hey, wait a minute. The silver platter rule is no longer in effect. You can't go out and violate as a state or a city law enforcement agency, violate somebody's rights and then turn that information over to

the FBI so that they can use it in federal court, nor can the Federal Government do that, either," because – and actually, it was in these (p. 36) particular cases it had to do with the federal agents violating people's rights, turning them over to state agencies, and that's what he wants to do now.

He's saying, "Forget about the Weeks case. Forget about Miranda. Forget about Mapp vs. Ohio. Forget about Byars and Lustig. Change the United States. Give the Mesa Police Department the right to use an illegally seized confession or admission that they could never use in federal court, but let us use it in state court."

And, Your Honor, that is just not the law of this land. And for that reason, based upon that argument, I respectfully request that not only should the first alleged confession and admission be suppressed, but that the second confession and admission made to Donna Sarivola allegedly in this car ride down to Pennsylvania also be suppressed.

Thank you, Your Honor.

* * *

(p. 38) MR. SCULL:

* * *

We have never admitted and never said or implied that if the FBI screwed up, so what. We should be allowed to use this evidence.

Contrary to the defense attorney's statements to you, Judge, I am somewhat familiar with Mapp and some of the other cases that he's cited, and I know that if one

agency violates the law, that the evidence cannot be used in a state court, for instance, if the federal was to violate the law.

* * *

(p. 42) We have agreed on the statement of facts that this man, this confidential informant was being paid by the FBI. Basically, he was being paid to furnish information about the Columbo crime families and others in the New York City area.

When he was sent to prison on other charges, he kept a communication line open with the FBI. In fact, he was investigated or he was telling them about some other stuff that was going on in the prison that's unrelated to our case.

Well, he went to Oreste Fulminante and (p. 43) said to him, "Is this true or is this not true, this rumor about you killing your stepdaughter," and he did say to him, "You're in some danger here, as far as these other inmates are concerned. They might hurt you if they find out that you are in fact a child killer."

This is not anything that's outside the realm of common sense.

Oreste Fulminante, at that point in time, decided to tell Anthony Sarivola that, yes, indeed he did whack his daughter.

Now, whether or not that's reliable or trustworthy is a matter for the jury to determine at a later time, and that would be determined. It will be made obvious, because of the details that Mr. Fulminante told to Mr. Sarivola and will be related in this courtroom, and it will make it clear

that indeed Mr. Fulminante is the only source that Anthony Sarivola had, and he did relate the details sufficient enough to certainly prove that that's where Sarivola got the story.

I don't think there is any question about the voluntariness or the trustworthiness. There was never in any of the transcripts that I recall, and I still - I don't have the transcript, although Mr. Koopman has told me he's going to get it to me probably today or tomorrow, of Anthony Sarivola's statement.

(p. 44) I don't recall any statement in there that the Columbo crime family was being - promised some sort of protection to Mr. Fulminante.

What I remember is that Mr. Sarivola said, "I will protect you in this prison from physical recriminations from other inmates," and I don't know anything about the Columbo crime family being involved in that prison at all.

THE COURT: Was it in the context of, "I will protect you if you will tell me about this incident?"

MR. SCULL: "If you will tell me the truth, did you or did you not kill this girl?" "Whether you did or didn't," was not the crux. The crux was, "Just tell me the truth, and I will protect you then, because some of these inmates here may try to hurt you physically," and it's no doubt at that time Mr. Sarivola was sitting on some sort of commission in the prison, and they had some control over what went on there in the prison.

And that's a rather long story, and I'm not sure I know the full extent of it myself, but he was in a position to probably help provide physical protection.

* * *

(p. 57) THE COURT: One other question on the issue of force or threats, apart from Miranda, is that an (p. 58) objective test or a subjective test?

MR. KOOPMAN: I think the Judge must look at it from the totality of the circumstances, which is why I have put into my reply to the response excerpts from both Ticano's interview and Anthony Sarivola's.

SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

VIVIAN KRINGLE, Clerk

RC04-31159 NOv. 8, 1985

Div Date

HON. STEPHEN A. GERST L. Eng

Judge or Commissioner Deputy

NO. CR142821

STATE OF ARIZONA

County Attorney

vs

By: K.C. Scull

ORESTE FULMINANTE

Francis P. Koopman

This matter having been under advisement,

IT IS ORDERED denying Defendant's Motion to Suppress Admissions and/or Confessions dated October 25, 1985 with respect to alleged statements made to Anthony Sarivola on October 20, 1983 and allegedly repeated to Donna Sarivola on or about May, 1984.

The Court finds that the alleged statements contained in the State's Response (which was adopted by the Defendant for purposes of this hearing only) do not fall within the Miranda parameters. The Court does not find that at the time the statements were made that the Defendant was in custody or deprived of his freedom in a significant way. Although the Defendant was in a Federal Correctional Institution, there was no "custodial interrogation". In determining whether there was a custodial interrogation, the Court has considered 1) the site of the interrogation, 2) whether the investigation had focused on the

suspect, 3) whether the objective indicia of arrest were present and 4) the length and form of the interrogation.

Although the site of the statements given in this case was at a Federal Correctional Institution, the Court finds that no investigation had yet focused on the Defendant, there was no objective indicia of arrest with respect to this matter, and the length of the conversations was minimal.

The Court has reviewed the case of *Mathis v. United States*, 391 U.S. 1 (1976) and finds nothing inconsistent with this Court's present holding. This Court does not read *Mathis* to hold that every statement made to a paid informant as a result of a question asked while a person is incarcerated is a violation of *Miranda*. The purpose of the *Miranda* protections is to curtail coercive pressure to answer questions which could flow from a custodial interrogation of someone charged with or suspected of a crime. The Court does not find that the statements allegedly made in this case were the result of promises, threats or coercion by the Government or any of its agents.

IN THE SUPERIOR COURT OF THE STATE OF
ARIZONA IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA,	)	NO. 142821
Plaintiff,	)	MOTION IN
vs.	)	LIMINE
ORESTE FULMINANTE,	)	(Assigned to the
Defendant.)	)	Honorable
	)	Stephen Gerst,
	)	Div. 42)

COMES NOW the State of Arizona, by and through undersigned counsel, and respectfully requests that the Court enter it's order herein allowing the State to inquire of it's witnesses and of the defendant, should he take the stand, and of his other witnesses concerning the fact that the defendant was incarcerated in Raybrook Federal prison in New York State (in addition to the right to impeach the defendant concerning prior convictions, which motion has been filed heretofor), and as further shown and explained in the attached Memorandum of Points and Authorities incorporated herein by this reference.

Respectfully submitted this 25th day of November, 1985.

- THOMAS E. COLLINS
MARICOPA COUNTY ATTORNEY
BY /s/ K.C. Scull
K.C. Scull
Deputy County Attorney

MEMORANDUM OF POINTS AND AUTHORITIES

One of the key pieces of evidence in this case against the defendant is the fact that he made a confession of the

crime to Anthony Sarivola while the two of them were incarcerated in Raybrook Prison, a federal prison in up-state New York. Mr. Fulminante was imprisoned for the charge of a Felon Being In Possession Of Firearm or what is sometimes known as a Prohibited Possessor. It is the State's position that the elements surrounding the nature of the confession and the reasons that the confession was given to this particular witness are such an integral part of the entire environment that existed at Raybrook Prison at that time and place that the State should be allowed to introduce evidence as to the prison situation insofar as it relates to Mr. Sarivola and Mr. Fulminante's temporary confinement there.

It is not the State's intention to mention the nature of the charge for which Mr. Fulminante was imprisoned. In fact, there is nothing particularly heinous or prejudicial about that charge or his imprisonment, and if the State is not allowed to bring up the nature of the charge surely the defendant would bring it up.

Beyond the nature of the charge, however, it is significant that Mr. Fulminante was attempting to impress a person whom he believed to be a member of organized crime. Also, Mr. Fulminante expected future employment opportunities with this man. The fact that Fulminante, in a sense, idolized the witness Sarivola, and further that he looked to Sarivola as being in a position to provide Fulminante with some physical protection should other inmates of the prison seek recrimination against Mr. Fulminante for the horrible crime which he committed in Arizona.

All of these facts and circumstances go to support the voluntariness, the truthfulness and develop the seed bed wherein the confession, it is natural to believe, might be made.

Should the State not be allowed to present the evidence in its true light, it would be nearly impossible to give the jury the complete picture of why Fulminante would give this confession to this man. Certainly there were special circumstances involved and casual acquaintanceships on street corners would not ordinarily be expected to give rise to these kind of confidences.

Beyond that, it is important that Mrs. Donna Sarivola also be allowed to fully explain the circumstances under which she heard the subsequent confession from Mr. Fulminante in the automobile ride immediately upon Fulminante's release from prison. The reason, here again, is because Fulminante wanted to impress these people, believing them to be intimately connected with organized crime. This was his goading ambition in life, to become a member of organized crime and to prove that he was a very tough, cold and callous individual and could commit any kind of crime. The facts are it was a natural continuum of the conversation which started upon being asked why he didn't go to family upon being released from prison then the defendant continued to explain to her that he couldn't return to any family due to the fact that he had committed this homicide in Arizona. He then went on to explain to her some of the gory details, undoubtedly to shock Mrs. Sarivola and to convince her that she was dealing with a really tough, hard customer in Oreste Fulminante.

WHEREFORE the State respectfully requests that the Court enter its order herein allowing the State to go into the circumstances wherein Mr. Sarivola and Mr. Fulminante were imprisoned in Raybrook Prison, and the necessarily special environmental circumstances connected with that prison as it relates to the giving of the confession from Mr. Fulminante to Mr. Sarivola. Further, that the State be allowed to have Donna Sarivola explain in full the story as to how she became a party to receiving the subsequent confession from the defendant.

Respectfully submitted this 25th day of November, 1985.

THOMAS E. COLLINS
MARICOPA COUNTY ATTORNEY
BY /s/ K.C. Scull
K.C. Scull
Deputy County Attorney

Copy of the foregoing
mailed delivered this
25th day of November,
1985, to:

The Honorable Stephen Gerst
Judge of the Superior Court

Mr. Francis P. Koopman
1344 N. 16th Street
Phoenix, Arizona 85006

BY /s/ K.C. Scull
K.C. Scull
Deputy County Attorney

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA
THE STATE OF ARIZONA,) NO. 142821
Plaintiff,) MOTION
vs.) IN LIMINE
ORESTE FULMINANTE,) (Assigned to the Honorable
Defendant.) Stephen Gerst, Div. 42)

COMES NOW the State of Arizona, by and through its undersigned deputy and respectfully requests that the Court enter its order herein, ordering the defendant and or his attorneys not to mention in any way a tape recording made by Anthony Sarivola on or about February 3, 1984, on the grounds that same is collateral and has no material relationship to the present trial, and as further shown in the attached Memorandum of Points and Authorities incorporated herein by this reference.

Respectfully submitted this 22 day of November, 1985.

THOMAS E. COLLINS
MARICOPA COUNTY ATTORNEY
BY /s/ K.C. Scull
K.C. Scull
Deputy County Attorney

MEMORANDUM OF POINTS AND AUTHORITIES

On or about February 3, 1985, a witness in the above captioned case Anthony Sarivola, made a fictitious tape for the FBI in New York City. At that time Mr. Sarivola

was a confidential informant working for the FBI on the streets of New York City and in particular working within the frame work of organized crime. Mr. Sarivola felt that he was under a certain amount of pressure to produce on his agreement with the FBI to get information for them concerning loan sharking activities in that area. He decided to make a false tape recording wherein he represented that he was having a conversation with another person presumably a member of organized crime. Wherein, very briefly "juice" was discussed juice being the exorbitant interest recovered on loan sharking activities.

This tape was quickly discovered to be false and Mr. Sarivola admitted that it was false and his excuse for making this tape was that he felt pressured to produce information. Although, this tape did not attempt to in anyway produce any information it was meant to prove to the FBI that he was in fact working on trying to get information and was meant to "buy time".

It is the State's position that the making of this false tape is purely a collateral matter to the ultimate issue in this case. If Mr. Sarivola testifies the State feels the defendant should not be allowed to question Mr. Sarivola in any fashion about the making of this tape.

"The controlling rule is that when . . . the inquiries relate to only collateral matters the latitude of cross examination is for the most part in a trial courts discussion." *State v. Light*, 636 SW.2d 157 (1982), *State v. Messley*, 366 SW.2d 390, 393, *State v. Winn*, 324 SW.2d 637, 642-643.

In *Powell v. State*, 547 SW.2d 1, the Court held that you could not impeach on collateral matters stating

. . . "without the restriction on collateral matters a simple trial could be carried on for years".

In an Arizona case entitled *State v. Riley*, 684 P.2d 896 Ariz. App. 1984, the Court held that for a defendant to attack the credibility of a witness for a prior bad act the defendant must be able to show that the evidence would tend to show a motive to lie. The defendant in this case has presented no offer of proof indicating that there was any motive for Tony Sarivola to lie and his prior act of preparing the false tape for the FBI was collateral and would have no effect on his testimony concerning Oreste Fulminante. In other words there was no motive connecting the preparation of the false tape to the Fulminante case, making it collateral. There was no gain to Sarivola from the State of Arizona or any law enforcement agency for the making of the false tape.

In *State of Arizona v. Fletcher*, 670 P.2d 411, Ariz. App. 1983, the Court held that the defendant in that case could not impeach the confidential informant's credibility during cross examination by using an incident wherein he stole a birth certificate, he possessed a false birth certificate, he had a false passport and he had used heroin. The grounds given by the lower court were that such forays into collateral matters were too cumbersome and while in fact those inquiries may be relevant to test a witness's credibility it would in fact bog down judicial proceedings and therefore objectionable as being collateral.

In *Thompson v. Oklahoma*, 705 P.2d 188, 1985, the Court refused to allow inquiry into a collateral matter on the basis that the line of questioning was not probative of

the informant's truthfulness. They cite with approval *Carpenter v. State*, 530 P.2 1039.

It is the State's position in this case that the making of the false tape on a prior occasion by Anthony Sarivola was not the same as a false swearing under oath or an attempt to blame another for a crime. It was a false tape made for the purpose of getting more time to pursue a lawful end that is the securing of evidence of criminal enterprises and in fact, this was accompanied by Mr. Sarivola. For that reason it is collateral and certainly is not probative of the truthfulness of Mr. Sarivola and cross examination or inquiry into this area should not be allowed.

Respectfully submitted this 22 day of November, 1985.

THOMAS E. COLLINS
MARICOPA COUNTY ATTORNEY

BY /s/ K.C. Scull
K.C. Scull
Deputy County Attorney

Copy of the foregoing
mailed/delivered this
22 day of November,
1985, to:

The Honorable Stephen Gerst
Judge of the Superior Court

Francis P. Koopman
1344 N. 16th Street
Phoenix, Arizona 85006
Attorney for Defendant

BY /s/ K.C. Scull
K.C. Scull
Deputy County Attorney

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA,)
Plaintiff,) CR-142821
vs.)
ORESTE C. FULMINANTE,)
Defendant.)

Phoenix, Arizona
December 3, 1985
2:09 o'clock p.m.

BEFORE: THE HONORABLE STEPHEN A.
GERST, JUDGE

Reporter's Transcript of Proceedings
Volume II - Trial

* * *

(p. 3) THE COURT: Good afternoon, ladies and gentlemen. We're going to start the process of jury selection as soon as I call the case.

This is State of Arizona versus Oreste Fulminante, CR-142821 on for trial.

* * *

(p. 32) There will be in this case evidence that Mr. Fulminante has been convicted of other crimes in the past. I'll give you further instructions as to the legal effects of that kind of evidence and how you should consider that evidence.

Would the fact, however, just knowing that Mr. Fulminante has had prior convictions in the past, have any effect on your ability to render a fair and impartial verdict in this matter?

(No verbal response.)

I take it by your silence it would not.

(p. 46) This is the time the Court set for the hearing of various motions. First matter is a Motion for Reconsideration on Motion to Suppress. I have read all of these motions that I'll make reference to. I have read the case which is attached, which is the Kennedy case.

Either of you have anything to add to the Motion for Reconsideration?

MR. KOOPMAN: I have nothing further, Your Honor.

MR. SCULL: No. Nothing further, Judge.

THE COURT: The Motion for Reconsideration is denied.

MR. KOOPMAN: Your Honor, as a point of law - I'm not arguing it, sir. I just, as a point of law, I believe that Your Honor must make a specific (p. 47) finding of voluntariness, pursuant to A.R.S. 13-3988, and I think - I read your minute entry, sir, and I'm not quite sure whether that was adequate enough according to case law.

THE COURT: I believe my ruling essentially was that this was not an interrogation, which comes within the purview of Miranda.

MR. KOOPMAN: That's correct, sir.

THE COURT: Whether or not I have to make a separate determination on noncustodial interrogations, as to whether statements are made voluntarily or involuntarily before a jury considers it, I don't know.

MR. SCULL: Judge, I don't know either, but I think that we could make that finding on the record to satisfy Mr. Koopman. I think that all of the facts and the arguments and the cases are in, and I think you could make the finding that the statements were voluntarily made.

THE COURT: Well, based on the information which was presented to me, which was only in the form of arguments and a stipulated set of facts, I do not find that there was anything other than voluntary statements that were made, and the ultimate question of voluntariness to any law enforcement officer would be a determination for the jury and as part of my standard (p. 48) instructions.

MR. KOOPMAN: Thank you, Your Honor.

THE COURT: Since you've requested a finding by the Court, the finding of the Court will be that any statements that were made to Mr. Sarivola or Donna Sarivola, his wife, were made voluntarily.

MR. KOOPMAN: Your Honor, just so I can make this clear, that's not for my benefit. I'm just trying to keep the record clear.

THE COURT: Yes. I do not know whether that's a required finding under these circumstances, but it's in the record now.

THE COURT: The motion for - all right.

The next matter was a Motion in Limine filed by the State dated November 25, relating to a request that the Court enter an order allowing State to inquire of its witnesses, and that the Defendant, should he take the stand, and of his witnesses, if any, concerning the fact that the Defendant was incarcerated in Raybrook Federal Prison in New York State. Is there any argument on this motion?

MR. SCULL: Judge, I don't think so. Most of that is moot now as I understand it because there has been an admission in the questioning to the jury about the fact that the Defendant was incarcerated, so I would (p. 49) assume then that I would be able to go into this at trial, to a limited extent to at least show the surroundings concerning the confessions.

THE COURT: It's really the opposite of a motion in limine. It's a motion to - anticipating a possible objection, I suppose; is that right?

MR. SCULL: Well, yes. I think, because as the Court is aware, any time you mention that a Defendant has been in prison on other charges, you have got an almost instant mistrial. So to avoid that situation, I want to bring it up ahead of time.

THE COURT: All right. Do you wish to be heard on that, Mr. Koopman?

MR. KOOPMAN: Yes, Your Honor. Your Honor, I have already indicated to Mr. Scull that it would be ludicrous of us not to bring into the fact or bring in or allow in a direct case presented by Mr. Scull, the fact that

my client was incarcerated in Raybrook Prison. Otherwise, there could be no explanation for the conversation between him and Mr. Sarivola and it would certainly hamper my attempts to attack Mr. Sarivola's credibility.

The problem that arises with this, Your Honor, is that I do not want the jury left unknowledgeable as to what that specific charge was and (p. 50) if the fact was he was doing time for illegal possession, as a felon, of a firearm, which was the .357 magnum, I understand, which he owned here in Arizona.

Well, if we tell the jury that he was doing time in Raybrook for possession, as a felon in possession of a firearm, they are going to be trying to guess at what the underlying felony was.

I, therefore, have indicated to Mr. Scull that I'll stipulate and agree that he may bring into evidence the fact that my client was convicted in 1971 of the crime of uttering a check by false endorsement, which in fact he was found guilty of.

I think the only problem, Your Honor, and perhaps we ought to get on to that right now. This might be the appropriate time to do that. The only problem that Mr. Scull and I have is, is Mr. Scull would like to get into evidence, either in his direct examination of witnesses, because of my client's - because I have already admitted that my client has been previously convicted of a felony, a 1964 conviction for what we used to call on the East Coast statutory rape when he was approximately 21 years old, and had sex with a 15 and a half year old girl.

In those days, they used to tell you, you either go into the Army or you do three years, which is (p. 51) exactly what happened in his case. Mr. Scull would like that fact, which is a 21 year old case, put in or for him to be allowed to put that into evidence.

I suggest to you, Your Honor, that this has been Mr. Scull's attempt to lay an undercurrent of sexual misconduct before the jury pertaining to my client. There's no evidence in this case at all of any sexual misconduct by my client and therefore, Your Honor, I would request that the Court order at this point in time that neither on the direct case as put on by Mr. Scull from his witnesses, nor, if my client takes the stand, in his cross-examination of my client as to his prior convictions should that 21 year old conviction be allowed into evidence.

THE COURT: Well, okay. Just for purposes of clarification, his first request was to allow evidence to come in of the fact that your client was imprisoned in New York, what he was imprisoned in New York for, and the underlying felony for which that crime he was in prison for related.

MR. KOOPMAN: And I'm saying as long as it just goes back to the 1971 conviction for the uttering a false check, which was a felony, and not back to the 1964 conviction for carnal abuse of a child.

THE COURT: Which one was it for?

(p. 52) MR. KOOPMAN: Excuse me, sir?

THE COURT: Which one was it for?

MR. KOOPMAN: Well, he had two prior felonies.

THE COURT: I see. So it could have related to either one?

MR. KOOPMAN: Could have related to either one.

THE COURT: Okay.

MR. SCULL: Well, I want to respond to the rest of his argument, but are you just going to handle that motion separately?

THE COURT: Yes. It will be - The Court will allow testimony relating to the circumstances under which - the circumstance that the Defendant was in fact incarcerated in a Federal facility in New York, will allow testimony, as both parties have agreed, that the Defendant was there and what the charges were that he was there on, which involved apparently a firearm possession charge by a convicted felon, and will allow reference to a 1971 conviction for uttering a false check. Is that what is was?

MR. KOOPMAN: That's correct, sir.

* * *

(p. 57) THE COURT: All right. The next matter is a Motion in Limine filed by Mr. Scull dated November 22, (p. 58) requesting the Court to enter an order ordering the Defendant or his attorney not to mention a tape recording made by Anthony Sarivola on or about February 3 in two different places.

In this motion, you give me two different dates. One is 1984 and one is 1985, which is it?

MR. SCULL: 1984, excuse me.

THE COURT: Okay. 1984, on the grounds that that tape recording is collateral and has no material relationship to the present trial.

Do you wish to be heard on this, Mr. Scull?

MR. SCULL: I think I have set forth the facts, Judge. At the time that Mr. Sarivola made the fictitious tape, he was an informant working for the F.B.I. in New York City.

At the particular time that he made it, he felt that he was under some pressure to produce something. So he produced a fictitious tape, which really in essence says nothing, but he did present that to the F.B.I. as being a factual recording of the conversation between he and another person who he played both roles.

There was nothing in the tape to try to put the blame for a crime onto anyone or nothing was done because of that.

(p. 59) The F.B.I. caught it immediately as being an obvious forgery. He was confronted and admitted that it was a forgery. He then proceeded to continue to work for them and do other things.

THE COURT: When was this?

MR. SCULL: In 1984. February, I think.

THE COURT: Anything else?

MR. SCULL: No, that's it.

MR. KOOPMAN: Your Honor, if anything goes to the credibility of Mr. Sarivola as a witness, it's his attempt to defraud the F.B.I. by making the false tape. Now, I have no objection, Your Honor, to not playing the tape in

court or putting the tape itself into evidence because the tape is really inconsequential.

It's Mr. Sarivola playing two parts. But, I do not feel that it is appropriate for the Court to disallow me from going into that tape, into the circumstances under which that tape was made, and the reasons that it was made, because I intend to show that when Mr. Sarivola allegedly heard this confession from Mr. Fulminante and reported it to his contact, Agent Ticano, he was also under pressure at that time to get information for the FBI, and I think to show that he would go so far as to falsify a tape, to make a phony tape where he played both parts of a conversation, and (p. 60) then attempt to con the F.B.I. into believing that this was a true tape, that this was a true conversation involving criminal conduct, shows the type of person he is.

Not only that, Your Honor, Mr. Scull has not told you all of the circumstances involved in that tape. First of all, it was not discovered right away.

Mr. Ticano, when he was given the tape, took it, listened to it several times and said, "There's something wrong here."

He finally went to Sarivola and said, you know, "Tony, there's something about this tape. I don't know what it is, but there's something wrong here."

And Tony said, "No, man, there's nothing wrong with that tape. It's a legitimate tape."

Ticano went back to his office and played it again, and then realized that that tape had not been made in

Hauppauge, Long Island. It had been made in Brooklyn, New York, because of the background sounds.

He then again confronted Sarivola; Sarivola again denied it. They then brought Sarivola down to F.B.I. headquarters and put him on a polygraph and it wasn't until after he failed the polygraph that he said - finally admitted that he had phonied that tape.

That is what the true story is, Your Honor, (p. 61) and I think it's important for that jury to know the type of man that's going to get up there and say that this man confessed to him. And I think that goes right to the heart of his credibility.

* * *

(p. 64) THE COURT: You know, I think from what little I know about this trial, the character of this man for truthfulness or untruthfulness and his credibility is the centerpiece of this case, is it not?

MR. SCULL: It's very important, there's no doubt.

* * *

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

VIVIAN KRINGLE, Clerk

<u>RC04-31159</u>	<u>12-3-85</u>	<u>Hon. Stephen A. Gerst</u>
<u>Div</u>	<u>Date</u>	<u>Judge or Commissioner</u>
<u>L. Eng.</u>	<u>NO. Cr 142821</u>	
<u>Deputy</u>		

State vs Fulminante

(Cont'd)

Defendant's Motion for Reconsideration of Motion to Suppress is submitted on the memoranda.

Ordered denying said motion.

The Court finds that the statements made to the Sarivolas were made voluntarily.

State's Motion in Limine requesting that the State be allowed to inquire of the Defendant and other witnesses as to why Defendant was incarcerated in Raybrook Federal Prison in New York is argued to the Court.

The Court will allow testimony relating to the circumstances under which Defendant was in fact incarcerated in a federal facility in New York since both parties stipulate that said testimony may be admitted since the circumstances of Defendant's incarceration and the reasons for Defendant's incarceration are necessary to a full understanding of the admissible evidence.

The Court will allow testimony with reference to the 1971 conviction for uttering a false check by stipulation.

IT IS ORDERED granting the motion in limine with respect to Defendant 1964 conviction for carnal abuse.

The State has moved in limine to prohibit evidence regarding a tape recording made by Anthony Sarivola in 1984 for impeachment purposes.

IT IS ORDERED denying the motion in limine.

* * *

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA,)	
	)	Plaintiff,
vs.)	
ORESTE C. FULMINANTE,)	
	)	Defendant.
)	

Case No.
CR-142821

Phoenix, Arizona
December 4, 1985
1:57 o'clock p.m.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
VOLUME III - Trial

* * *

(p. 12) THE COURT: All right. Mr. Scull, you may proceed.

MR. SCULL: Ladies and gentlemen, . . . I am K. C. Scull, and I work for the County Attorney's Office. I'm a prosecutor.

* * *

(p. 27) The Police have a real good idea who they think committed this homicide. Mark Jones will testify that at this point in the investigation, he thinks that Oreste Fulminante took his daughter out in the desert and killed her, is what he thinks, but what brings us to Court, what makes this case fileable, and prosecutable

and triable is that later, Mr. Fulminante confesses this crime to Anthony Sarivola and later, to Donna Sarivola, his wife.

Mr. Sarivola will come in and testify and explain to you the circumstances under which he received or heard the confession of Mr. Fulminante's.

(p. 28) This confession was given in a Federal prison. Mr. Sarivola was there on what is called a loan sharking-type conviction.

Mr. Sarivola is not a preacher. He is not the boy next door. He is not an innocent in any sense of the word. He has connections with or had at that time, and previous to that time, he had connections with organized crime families in the New York City area.

At the time that Fulminante gave his confession to Sarivola, Sarivola was working for the Federal Bureau of Investigations.

Obviously, Mr. Fulminante was not aware of that fact, nor was he made aware of that fact until recently.

Mr. Sarivola has been involved in a lot of things for quite some period of time.

He was a Police Officer in Seagate, which is an area, a part of Brooklyn.

At the same time, he was also connected with organized crime, involved in these loan sharking activities.

The State is rarely, if ever, in a position of choosing witnesses to homicides or to any other crimes.

(p. 29) If we were, I supposed we'd pick folks like yourselves and present nice, pristine people and as near normal or as perfect in every way as possible.

We can't do that. You have to take Mr. Sarivola's testimony as it's offered to you. Here is a tough guy from the streets of New York, and he has the New York accent or brogue, and I hope you're not too offended by his accent, but he is a tough guy; I guess a wise guy, but there are some things about that that I think are very interesting, and I just want to key you a little bit to some of his testimony, and maybe you'll look for it, and maybe it will come out this way.

One of the believable things about Tony Sarivola's testimony, I think you'll find, is that this is the kind of guy that Oreste Fulminante would be impressed by; the kind of guy that he would, I guess, sort of worship or idolize or want to emulate.

* * *

(p. 32) THE COURT: All right. Mr. Koopman, you may proceed with opening statement.

MR. KOOPMAN: Thank you, Your Honor.

Your Honor, Mr. Scull, ladies and gentleman of the Jury. My name is Francis Koopman. I'm Lester Fulminante's Court-appointed attorney. I will be defending him in this trial.

* * *

(p. 39) You've heard Mr. Scull say that he is going to present a lot of testimony, a lot of evidence that will make Lester seem to be a bad person.

Well, the Judge told you when he was Voir Diring the Jury, that Lester has some prior felony convictions, and you will learn that during the course of trial that indeed, Lester is a felon. In fact, when he made his alleged, and I say alleged, statement to Anthony Sarivola, the statement was made at Raybrook Prison or Correctional Institution in New York where Mr. Fulminante, along with Tony Sarivola was incarcerated.

He was in jail for the crime of a felon in possession of a firearm.

That firearm being the firearm which Mr. Scull has described for you, the .357 Dan Wesson.

In this country, under the United States' law, if you have a prior felony conviction, in other words, if you have in the past in your life been convicted of a felony and have not had your civil rights (p. 40) restored by the Judge, by a Court, you cannot, under federal law, own a weapon or a firearm.

Mr. Fulminante had a prior felony conviction.

He was a convicted felon when he owned that .357 Magnum here in Arizona in 1982.

He had been convicted in 1971 of issuing bad checks in New Jersey. That means he passed bad checks to store owners or others for money. He pled guilty to that charge, and when he was charged with being a felon in possession of a firearm at the end of '82, the beginning of '83, he pled guilty to that, also.

* * *

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA
THE STATE OF ARIZONA,)
Plaintiff,) CR-142821
vs.)
ORESTE C. FULMINANTE,)
Defendant.)

Phoenix, Arizona
December 10, 1985
11:07 o'clock a.m.

BEFORE: THE HONORABLE STEPHEN A.
GERST, JUDGE

Reporter's Transcript of Proceedings
Volume V - Trial

* * *

(p. 4) MARK JONES,

called as a witness herein, having been previously duly sworn, was examined and testified as follows:

CROSS-EXAMINATION (Continued)

BY MR. KOOPMAN:

(p. 45) Q. In other words, the information on criminal history, you would get through LEJIS and not through ACIC or NCIC, you just get back warrants, is that correct?

A. That's is the way way - yes, sir.

Q. Okay. In fact, would it be fair to say that by using these sources available to you, you were able to determine, for example, that Mr. Fulminante had a prior conviction for passing bad checks, a felony in 1971 in New Jersey?

A. Yes. You could retrieve information.

Q. And in fact, it was you who passed that information on to ATF, Alcohol, Tobacco and Firearms, when he was arrested by them for the felony, the federal felony, of possession of a firearm by a felon?

A. Myself and fellow detectives.

Q. Yes.

A. Yes.

* * *

(p. 75) REDIRECT EXAMINATION

BY MR. SCULL:

* * *

(p. 82) Q. Anybody back in New Jersey area?

A. Yes, sir. He referred to his ex-wife.

Q. Deborah DeStefano?

A. Yes, sir.

Q. All right. Anybody else?

A. A man that he was in prison with.

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA
THE STATE OF ARIZONA,)
Plaintiff,)
vs.) CR-142821
ORESTE C. FULMINANTE,)
Defendant.)

Phoenix, Arizona
December 11, 1985
1:55 o'clock p.m.

BEFORE: THE HONORABLE STEPHEN A.
GERST, JUDGE

Reporter's Transcript of Proceedings
Volume VI - Trial

* * *

(p. 5) ANTHONY MICHAEL SARIVOLA,
called as a witness herein, having been first duly sworn,
was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SCULL:

Q. Would you state your name for the record
please, sir?

A. Anthony Michael Sarivola.

Q. Mr. Sarivola, I want to first develop a little of your background for us, please. Will you tell us where you were born and raised?

A. Brooklyn, New York.

Q. And what is your educational background, sir?

A. G.E.D., high school diploma.

Q. Were you ever in the service?

A. Yes, I was.

Q. And did you have employment?

A. Yes, I did.

Q. And what kind of employment did you have sir?

A. I worked for the Seagate, New York Harbor Police Department, Wells Fargo Armored Car, various limousine services throughout the years.

(p. 6) Q. And how old are you now, sir?

A. I'm 30 years old.

Q. Regarding your service with the Seagate Police Department, first, inform us what Seagate is?

A. Seagate is a cooperative on the southwestern edge of Brooklyn, New York.

Q. And what kind of duties did you have for them?

A. I worked for the police department and we were authorized peace officers under the Criminal Procedure laws of the State of New York.

Q. And what kind of duties did you perform? Were you a patrol officer?

A. Patrolling and protecting life and property, issuing traffic citations.

Q. All right. How long were you employed with Seagate?

A. Over a span of two years.

Q. How long were you employed in what we might call active everyday service?

A. About five months.

Q. And why do you say two years then?

A. Because I had to come back to testify for cases I had going, and twice I came back to help when they were short.

(p. 7) Q. All right. Did you attend any police academies or anything?

A. Yes, I did.

Q. Or was there any certification to be a police officer?

A. Not at that time, it wasn't required. Then they came out with a peace officer law in the State of New York that everybody who was appointed a peace officer and there was no requirements for, they made you take 280 hours of classroom.

Q. Did you do that?

A. Yes, I did.

Q. Did you did attend an academy?

A. Yes.

Q. What academy?

A. Classes were at the New York City Police Academy on 20th Street and Manhattan.

Q. Did you graduate?

A. Yes, I did.

Q. Now, why did you leave the Seagate Police Department?

A. For financial purposes.

Q. And were you at that time also working with an armored car company?

A. Yes. Scorpion Armored Car.

(p. 8) Q. Excuse me?

A. Scorpion Armored Car Company.

Q. How long were you with them?

A. About eight months.

Q. All right. Is it fair to say that you handled cash for them?

A. Large amounts up to three, four million dollars.

Q. Now, when you say you quit Seagate for financial reasons, what are you talking about, Mr. Sarivola?

A. We were only at that time paid \$160 per week before taxes. A real low paying job, and I just had a new child that was born, and I had purchased a house, and I was working two jobs, and just wasn't making it.

Q. So what did you elect to do?

A. I elected to go with some friends who were - had a lot of financial advantages for me.

Q. What kind of friends were these, Mr. Sarivola? Was it criminal activity, it that what you are talking about?

A. Yes, sir.

Q. What kinds of friends were they?

A. Members of an organized crime family.

Q. And is it true to say then that you worked (p. 9) with them for some time?

A. Yes.

Q. How long approximately did you work with them?

A. Until 1984.

Q. During the time that you were a police officer at Seagate were you connected with these people and working for them and with them?

A. Yes. In a lot of fashions.

Q. All right. About what year was this, Mr. Sarivola, that you would have first made some sort of a full time commitment to your organized crime activities?

A. Late '78, early '79.

Q. Now, then there came a time when you decided to change your career; is that correct?

A. Yes.

Q. And when was that?

A. That was in early 1983.

Q. And what did you do to effect this change?

A. I arranged a meeting with a Special Agent Walter Ticano, an officer of the Federal Bureau of Investigation, and told him that I did not want to participate in the life that I was participating in any more and that I would assist him in making cases against members of organized crime.

(p. 10) Q. And did you proceed to do that then, sir?

A. Yes, I did.

Q. And have you done that until this time?

A. Yes, I have.

Q. And have you made cases for the FBI?

A. Yes, I have.

Q. And does it involve some high ranking members of organized crime?

A. Yes, it does.

Q. Some of those cases are ongoing at this time; is that correct?

A. Almost all of them are.

* * *

Q. Mr. Sarivola, have you spent time in prison?

A. Yes, I did.

Q. And when did you spend time in prison?

A. From some - the end - about the middle of September of 1983, until November 28th, somewhere in that vicinity.

Q. Is that roughly about 60 days?

(p. 11) A. Roughly about 60, 70 days like that.

Q. All right. Where did you spend this time?

A. Raybrook Federal Correctional Institution.

Q. Where is that?

A. Raybrook, New York.

Q. And did you meet one Oreste Fulminante at that institution?

A. Yes, I did.

Q. And is he present in the courtroom today?

A. Yes, he is.

Q. Would you point him out and describe what he's wearing for the record, please?

A. He's sitting right over there. He's wearing a brown shirt with checks, beige pants, beige shoes. He's sitting next to his defense attorney, Mr. Koopman.

MR. SCULL: May the record reflect further identification of the Defendant, please?

THE COURT: Yes, if may so reflect.

Q. BY MR. SCULL: Do you recall when you first met the Defendant?

A. Yes, I do.

Q. Can you tell us when that was?

A. It was approximately about the eighth day I was in prison. I had just been released from administrative detention.

(p. 12) Q. Does that mean that when you come into prison, you are kept somewhat secluded or isolated for a short time?

A. Well, sometimes if they don't have your records, they will keep you there until they get your records.

Q. All right. So you do recall meeting him for the first time?

A. Yes, I do.

Q. Now, at this time, were you working for the FBI?

A. Yes, sir.

Q. Were you undercover, so to speak?

A. I was an informant.

Q. All right. So you were keeping up a masquerade of being an organized crime connected figure?

A. That is correct.

Q. Were you being paid by the FBI at that time?

A. At that time, no.

Q. Okay. Was the fact that you were in prison somehow related to any deal that you made with the FBI?

A. I was in prison because of my conviction on an extortion charge.

Q. What kind of extortion charge? Explain to us why you were convicted.

(p. 13) A. I was convicted of loan sharking. It's called Extortion for Credit Transaction.

Q. All right. Explain to the Jury, and to us, what loan sharking is?

A. Loan sharking is when you lend money to somebody for a higher rate of interest than they would pay at the bank, and should they not pay the loan, you use violence or threats to collect the money.

Q. And that was your main business, was it, before you went to prison?

A. Yes, it was.

Q. Did the FBI or any law enforcement agency forgive any other criminal actions of yours that they were aware of at that time?

A. They had no other at that time.

Q. The FBI, or some federal agency, did commence to pay you some funds at sometime, did they not?

A. Oh, yes, they did. It was for the quality of information provided. The payments would vary according to the quality of the information.

Q. All right. And were they paying you - did they pay you any amount during the time you were in prison, for instance?

A. No.

Q. What kind of acquaintanceship and (p. 14) relationship with the Defendant did you have while you were in prison?

A. We became friends. We used to hang out. We lived in the same unit and worked in the same section.

Q. Well, describe this unit for us. Is it a free flow among prisoners or are you locked up or -

A. No. They only lock you down at night. During the day you have the key to your door so you can shut it so nobody can get in and rob things, so the majority of the time, you have a free flow to walk around and hang out.

Q. Okay. And how often would you see the Defendant while you were in prison?

A. Every day.

Q. And how often in the day would you see him?

A. Usually for an average of maybe some days, you know, seven hours a day; some days, two or three.

Q. Well, how did you pass your time in prison? Did you read or did you watch television, or talk, or what?

A. Read, watch television. Most of the time we used to hang around and talk.

Q. Did a rumor concerning this Defendant come to your attention while you were in prison?

(p. 15) A. Yes.

Q. What was that rumor?

A. The rumor was that he was wanted - not actually wanted on a warrant, but they were investigating him for killing a child in the State of Arizona.

Q. Did you know anything about this killing in Arizona?

A. No, I did not.

Q. Did you ever have access to Arizona papers or Arizona news of any kinds?

A. No, I did not.

Q. Did anybody from Arizona ever come to that prison and interrogate you about anything to do with Arizona?

A. No, they did not.

Q. Had you ever heard of Mesa, Arizona, prior to that time?

A. No, I did not.

Q. All right. Did there come a time, then, when you talked to the Defendant about this rumor of the killing in Arizona?

A. Oh, we talked quite a few times on it.

Q. Well, what did he tell you?

A. Well, in the beginning, he denied that he had anything to do with it and he said first that bikers (p. 16) did it and they were looking for drugs.

And then he said he didn't know what happened.

Q. All right. Did you tell Mr. Walt Ticano of the FBI about this situation with Mr. Fulminante?

A. Yes, I did.

Q. Did he give you any instructions or directions, comments? Tell me what he said.

A. The only thing he said to me was, you know, "Find out more about it. Give me - get me something to look at."

Q. What did you do then?

A. Well, I continuously stayed around. Another gentleman that used to hang out, a fellow by name of Vince DeMarco, me and him and Mr. Fulminante used to hang out together. And quite a few times the conversation came up, and I used to try and try and pick up whatever I could.

Q. All right. Tell me, did he ever tell you anything about it?

A. At that time, no. It went on for a few months, up until almost the time I got out.

Q. All right. Tell me when he told you what he had done?

A. It was, oh, the latter part just before I (p. 17) got out. I'd say a couple of weeks before I got out.

* * *

Q. Tell us what he told you?

A. Well, quite a few nights after dinner, we used to go walking on the - there's a track because it used to be the only big training grounds, so they have a big running track.

And we used to go walking around, and he was getting a - starting to get some tough treatment and whatnot from the guys and I told him, you know, "You have to tell me about it," you know. I mean, in other words, (p. 18) "For me to give you any help." And he told me that he did in fact kill her.

Q. What did he tell you, as closely as possible the words that he used as he described this to you?

A. He told me that - he said that he "clipped her."

Q. "Clipped her"?

A. "Clipped her."

Q. What does the term "Clipped" mean?

A. "Clip" means to kill somebody.

Q. All right. Did he tell you anything else about it?

A. He said that he had took her out to the desert and he shot her twice in the head.

Q. Did he tell you why he did it?

A. He said that she was a little bitch and she was always in his way with his wife. She started a lot of trouble.

Q. Did he describe the surroundings in which he did this to her?

A. He said it was the desert and there was some rocks, you know, and sage brush and stuff like that and all I could know what he was saying is pictures from what I have seen on TV, because before that, I had never seen a desert except for around Las Vegas.

(p. 19) Q. All right. Did he say how he took her to the desert?

A. He said on a motorcycle.

Q. Did he say where his wife was at that time?

A. He said she was not at home. He was supposedly watching her or something like that.

Q. All right. Do you know where the wife was at that time?

A. No, I do not.

Q. Did he tell you that he did anything else to the child?

A. Well, he was talking something about her giving him head.

Q. What do you mean by that; you mean, oral sex?

A. Oral sex.

Q. He made her give him oral sex?

A. Something like that I recall. I do not exactly, you know, remember his exact words. Or -

Q. Do you have any recollections as to how he preformed this or did this?

A. No, I do not.

Q. Did he say that he did anything else to the child besides shooting her and the sexual assault?

A. He said that he choked her and made her beg (p. 20) a little bit.

Q. Did he say how he choked her?

A. No, he didn't.

Q. Did he ever describe a weapon to you?

A. Yes. A .357 magnum Dan Wesson revolver.

Q. Do you remember talking specifically about that kind of revolver?

A. Yes, I do.

Q. Did he tell you anything unique about that kind of revolver?

A. That he had bought another barrel for the weapon.

Q. And did he tell you that he used that in any way or not?

A. He said he did not use the other barrel.

Q. Did he ever tell you what happened to the weapon?

A. He - as far as I can remember, is that he left the weapon out in the desert somewhere.

Q. Now, what kind of reputation, if you know, did Mr. Fulminante have around the prison for being truthful and honest?

A. Well, most people believed him not to be truthful.

Q. Now, what makes you think he was telling you (p. 21) the truth at this time?

A. Because one of the few times he became serious and he was and not trying to put up a front about it.

Q. Did he ever tell you there was a pile of rocks by where he killed her?

A. Yes, he said something about a pile of boulders.

Q. What kind of relationship did he describe to you that he had with this girl?

A. Very lousy relationship. He thought that she was always in the way between him and his wife, and she was a little bitch.

Q. And how did he refer to her in these conversations?

A. Usually a little fucking bitch. Those were usually his words towards her.

Q. Did Mr. Fulminante express any remorse to you about this killing?

A. No, he did not, sir.

Q. Did he ever on any subsequent occasion?

A. No, he did not.

Q. Did you talk about this on any subsequent occasions?

A. Yes, we have touched on it a few times (p. 22) before I actually departed from prison.

Q. Did he ever tell you where the gun was hidden?

A. Somewhere by that pile of rocks.

Q. Did he ever make any statements about the authorities being unable to find it?

A. Yes. He always said that they were too fucking stupid to get him, that they never knew where to look, and – but he did say that they were constantly applying pressure and he was very, very worried it would be waiting for him when he got out of Raybrook.

Q. How did you feel when he told you, when he gave you this confession?

A. Sick. How could you kill a kid?

Q. Now, Mr. Sarivola, you've been involved with organized crime and I imagine you've been involved in some tough incidents in your life, haven't you?

A. Yes, I have.

Q. What about this that makes you particularly sick?

A. How could you do anything to a child? I mean, we used to do things to each other but it was among men.

Q. After you got out of prison, Mr. Sarivola, did you continue to work for the FBI?

(p. 23) A. Yes, I did.

Q. And did you get paid and furnish them with information?

A. Yes, I did.

Q. Did you get paid anything by the FBI for any of the information connected with this case?

A. No, I do not believe so.

Q. Did you receive any benefit from the FBI or any federal agency concerning this case?

A. No, I did not. It was not a federal case. It wasn't under the federal jurisdiction.

Q. Have you ever received any money from the Mesa Police Department or Mark Jones?

A. Yes.

Q. And do you recall how much?

A. Total of six hundred bucks.

Q. Okay. And what was that money for, do you know?

A. Kennel expenses for dogs when I had to make the trips. And other expenses that went above what I was allowed for per diem.

Q. And you have subjected yourself to several interviews in regards to this matter, have you not?

A. Yes, I have.

Q. Do you remember approximately about when the (p. 24) first interview was?

A. It was somewhere in the latter part of September of 1984.

Q. And do you remember Mark Jones and myself and others being present?

A. Yes. There were - you were present, Detective Jones, and there was another fellow from your office. I don't remember his name.

Q. And two Federal agents, Special Agents Ticano and Charles Bernardo of the FBI, Jerry Burnstein from the U.S. - of the Eastern District of New York. And also, Laura Wood from the Eastern District of New York.

Q. All right. And that interview took place where?

A. At the United States' Courthouse up in the U.S. Attorney's office. I think it's the sixth or seventh floor in Brooklyn.

Q. Excuse me, were you finished?

A. Yes.

Q. Do you remember about how long that interview took place?

A. Oh, I'd say somewhere in the vicinity of about an hour and forty minutes.

Q. And during that interview, you told us some (p. 25) of these things that we have talked about, didn't you?

A. Yes, I have.

Q. You didn't tell us all of these things, did you?

A. No, I did not.

Q. Can you tell me why?

A. Number one is, for the two weeks preceding that, I was being interviewed eight hours a day, six days a week, by a multitude of federal agents on different cases.

I had a lot of pressure on me being in fear of my life because they had tried to kill me before I came off the street. And another reason is, I did not know what to expect from you.

Q. Would it be fair to say that you were somewhat abrupt almost to the point of being rude?

A. I would say I was hostile towards you.

Q. It was decided then - excuse me, let me ask that in the form of a question. Did you submit yourself then to follow up interviews with myself and representatives of police agencies?

A. Yes, I did.

Q. All right. And so we met again, didn't we, in another state?

A. Yes. Lexington, Kentucky.

(p. 26) Q. You talked to us at some length many times, did you not?

A. Yes, I did. You and an investigator by the name of Barker.

Q. Dan Barker from my office, correct?

A. Right.

Q. And at that time, you did not mention to us anything about a sexual assault that Mr. Fulminante told you about?

A. No, I did not.

Q. And do you remember why you did not tell us about that at that time?

Because nobody ever asked me about that. They only asked me about the incident itself and I didn't think - I don't know, I just wasn't very sure of it, because like I

said, it's only generality that I remember something about it. I had no details to that particular part of the statement.

Q. Okay. That interview concluded with some other new information, did it not?

A. Yes.

Q. Mr. Sarivola - and would you describe that other information?

A. That my wife Donna was also involved in a conversation with the Defendant when he came out of (p. 27) prison and we picked him up, and took him to Pennsylvania. And during that conversation, Donna and the Defendant had a conversation also about the incident.

Q. All right. And you were present at that time, you were driving the vehicle?

A. Yes, I was.

Q. Okay. Do you have any specific recollection about that conversation?

A. Well, they were having a conversation. I was driving. It was on the New Jersey Turnpike. And the situation came up about Arizona and his daughter and they were talking about it.

And, you know, it was - it was similarly something like the conversation that I had with him in prison, but you know, there was different wording, and I wasn't really paying too much attention, because I'd heard it before and I was driving and they were talking, and she even argued with him a little bit about it and she was disturbed about it.

Q. Okay. Do you remember any of the wording that was used? Do you have any recollection of that yourself?

A. No, I do not, sir.

Q. So it was at the Lexington meeting that we had that Donna's name came up for the first time; is that (p. 28) correct?

A. Yes, sir.

Q. And you volunteered that information?

A. Yes, sir.

Q. And you cleared it with her, I assume?

A. I went to a pay phone and called her, being the fact that I'm in a Federal Witness Protection program and nobody is allowed to know where I live, so I could not call in front of you.

I went there under the escort of Special Agent Charles Bernardo of the FBI. I dialed the number, he listened to the whole conversation. I just asked her if she would be willing to testify and she said yes.

Q. So then another meeting was set up; is that correct?

A. Yes. Sioux Falls, South Dakota.

Q. And why were we meeting in these different places, if you knew?

A. Because of my situation in the Witness Protection Program for safety, each time we would meet, it would be in a different city.

Q. Let me come back to the Witness Protection Program in a few minutes, okay?

A. Okay.

Q. We did meet then in Sioux Falls, South (p. 29) Dakota; correct?

A. Yes, we did.

Q. And you were interviewed again, which would be the third time; correct?

A. Yes, sir.

Q. And I was present and Detective Jones was present. Anybody else present?

A. Special Agent Walt Ticano and Special Agent Charles Bernardo with the FBI.

Q. And at that time, you mentioned something about the sexual assault for the first time; is that correct?

A. That is correct, sir.

Q. Now, up until this time, let's find out how long your relationship with Donna existed, okay?

A. Yes, sir.

Q. When did you first meet her, or first begin to know her?

A. Probably in the vicinity of about 12 or 14 years.

Q. All right. You are married to her now?

A. Yes, I am.

Q. When did you first commence to live with her or get married to her or however your relationship began specifically with her?

(p. 30) A. I would say the early part of 1984.

Q. All right. So is it safe to say that it was after you were in prison and you had the conversations with Mr. Fulminante in prison?

A. That is correct.

Q. After you came out of prison, did you tell Donna about your conversations Fulminante in prison?

A. No, I did not. She did not even know I was working for the FBI.

Q. When did she first know that?

A. She knew that about two days after I came off the street.

Q. When did you come off the street?

A. In the beginning of August of 1984.

Q. What do you mean by "coming off the street"?

A. At that point, after they tried to assassinate me, it was the Bureau's determination that I could no longer safely function as an operative on the street and that I would have to enter the Witness Protection Program in order to remain safe.

Q. All right. At this time, did you tell Donna anything about your conversations with Fulminante?

A. No, I did not.

Q. Have you ever told her anything about your conversations with Fulminante?

(p. 31) A. No, I did not.

Q. Has she told you anything about her conversations with Fulminante?

A. Other than what was disgust, no.

Q. Other than what? I'm sorry.

A. Her disgust with the Defendant.

Q. All right. Tell us what that is?

MR. KOOPMAN: Objection, Your Honor, hearsay.

THE COURT: Yes, that was an expression of an emotion. Objection is -

MR. SCULL: I'm sorry. I thought he said discussion. I'm sorry, I'll withdraw that question.

THE WITNESS: Discussions? The only discussions we have ever had about the case in general was generalities about, you know, coming here to testify, and about meetings.

Q. BY MR. SCULL: But did you ever discuss specific wording that the Defendant used or that you used or that she used in the conversations?

A. No, sir.

Q. I think I asked you what the term "street" means when you say coming off the street or going on the street?

A. It means actually, you know, living out in (p. 32) the city, working every day, carrying on your life.

Q. So since August of 1984 - is it 1984 that you've been in the victim witness or the Witness Protection Program?

A. Yes, sir.

Q. And describe that program for us, as it applies to you, Mr. Sarivola?

A. In what sense?

Q. Well, what is the program, first of all?

A. Well, the program is a vehicle to give people that cooperate with the government a new identity, a location to live, and assistance until you're able to take care of yourself financially.

Q. And do they also provide protection for you when you have to come out of your location?

A. Yes, they do.

Q. Like, for instance, coming here today?

A. Coming her today.

Q. And there are U.S. Marshalls in the courtroom today with you, aren't there?

A. Right. Also, with my family, and when I travel.

Q. All right. Mr. Sarivola, did there ever come a time that you doctored up a tape for the FBI?

A. Yes, I did.

(p. 33) Q. And do you recall when that was?

A. It was somewhere in the Spring of '84.

Q. And why did you do that?

A. Well, at the time, when I came out of the prison I had agreed to wire up against people and go into the program, because my relationship with the Bureau in the beginning was only as an informant; just to provide information and direct them towards making cases, not to actually testify.

So when I came out, my agreement had changed and I agreed to wire up and tape conversations and to actually testify in court proceedings. And they wanted me to get this particular person, and they wanted - they were putting a lot of pressure on me because it was not happening fast enough.

I had to get back into the main stream; you know, you have to get back into working slowly to get everybody's confidence back because you've been away from everybody. And Walter said that if I didn't pop this soon, I would have had to come off the street at that time and just do whatever I had already sitting on the shelf to be done.

And I told him if I could not come off, I was not ready to come off. I had to too many things, personal items to take care of. And every day, they just (p. 34) kept calling me about it and haunting me about it so I figured, you know, I'd give them what they want, get them off of my back, and then I'd do it and then I would bring it out and clear it up.

Q. So tell us what it is that you did?

A. I created a conversation on tape between me and the person that was allegedly to be.

Q. I think you referred to him as Mike?

A. Right. And I turned the tape over to Special Agent Ticano and, in fact, it did just what it was supposed to do. They left me alone after that and let me go on to what I had to do, except for the fact is, after that point, I stopped talking to Special Agent Ticano.

Q. All right. Did it later come to the attention of the FBI, Walter Ticano?

A. Well, yes, it did. Special Agent Ticano knew there was something wrong because we had had a very good relationship and all of a sudden I started avoiding him because I really did not like what it did. What I felt it was at the time, it was necessary to do in order to get him off my back.

Q. Did he challenge you about the tape?

A. Not for the first couple of weeks but after I kept staying away from him, yes, he did challenge it.

(p. 35) Q. What happened then? Did you eventually confess that it was a phoney tape?

A. Yes, I did.

Q. I'm going to hand you what has been marked as Exhibit No. 35, and just ask you if you can tell me what that is?

MR. KOOPMAN: Your Honor, may I see Exhibit 35? There was no 35 -

THE COURT: All right. He's just handing you a copy of it.

Q. BY MR. SCULL: Can you tell me what it is?

A. This is a transcript of that doctored tape.

Q. Have you had the opportunity to review that entire transcript now?

A. Yes, I have.

Q. You've seen it before this minute, have you not?

A. Yes, I have.

Q. All right. Is it a fair and accurate transcription of the false tape recording that you made for the FBI?

A. Yes, it is, sir.

Q. Would you read it for us, please?

A. You want the whole entire - from the top, or just from where it starts?

(p. 36) Q. Just read the part that is the false tape recording.

MR. KOOPMAN: Your Honor, I'm going to object. The document stands for itself. If he's going to move it into evidence, the jury will be able to read it. I don't know why we need it read.

THE COURT: Do you have any objection to the Jury knowing what the words are that were used in the tape recording?

MR. KOOPMAN: No, but perhaps since we have the tape recording, we might play it.

THE COURT: My question is, do you have any objection to their knowing what the words are?

MR. KOOPMAN: No.

THE COURT: All right. The witness may read the words to the jury.

THE WITNESS: "My name is Anthony Sarivola. I reside at 714 East 4th Street in Brooklyn. My date of birth is 3-30-55. I am going to attempt to tape a conversation. (Inaudible)"

And then it's inaudible. It's supposed to be with this gentleman Mike about loan sharking.

Q. BY MR. SCULL: Well, just read what the tape says.

A. "6:45 a.m. in the morning. The date is (p. 37) February 3rd, 1984." And it says "inaudible." "With Special Agent Walter Ticano. (Inaudible) I'm gonna to meet Special Agent Walter Ticano so he can take custody of the tape. (Inaudible) the car warmed up so I don't have to have the heater on when we get into the car. I'm getting out of the car now, and gonna go try and bring him into the car.

"Silence 20 minutes.

"So what's up, Mike?

"Huh?

"What's up?

"Here's the 1500, I owe you the juice for three weeks.

"How's your father doing?

"He's doing alright, I believe.

"What's the matter? You in a rush this morning?

"Yeh, I don't want to meet you, we, ah, we're going to be (inaudible).

"I didn't have no time this morning. So what do you wanna do? Do you wanna get together during the week?

"Yeh, I'll meet you Tuesday I think.

"Alright. Take care, buddy.

"OK."

(p. 38) Some conversation, the radio in the car makes it inaudible.

"Alright. I'll call you Tuesday night, alright. OK, buddy, take care. Say hello to your brother John.

"Alright, buddy, I'll call you on Tuesday, alright? (Inaudible) shit why I showed up in his house. Froze his ass up good. Alright."

Then it says Special Agent Walter Ticano, "Alright. This is Special Agent Walter Ticano. It's 11:05 a.m., ah, February 3, 1984. I'll be taking possession of a tape in which Anthony Sarivola (at this point it sounds as though someone switched off recorder for a while). 1500 hours, juice was discussed and, ah, various other subjects.

Q. All right. Except for that last statement, which was allegedly by Walter Ticano, the rest of that were statements that you made on this tape; correct?

A. Yes, sir.

Q. You played both roles here so to speak?

A. Yes, I did, sir.

Q. And you did that to try to get time or whatever you needed?

A. That's correct, sir.

Q. Okay. The one part there if you'll look on (p. 39) the first page of the transcription, about in the center, there is a statement "Here is the 1500, I owe you the juice for three weeks."

Do you know what type of reference you were making when you said that?

A. Well, I was in the shark operation with this gentleman and his cut was 1500 bucks for the three week period.

Q. And what is "juice"?

A. Interest.

Q. Does juice refer to the \$1500 lower to something else?

A. Oh, it's to the principal, in fact.

Q. Do you know if anything ever happened to the other subject that you represented on this tape because of this tape?

A. Nothing at all.

* * *

(p. 40) CROSS-EXAMINATION

BY MR. KOOPMAN:

Q. Mr. Sarivola, you indicated during your direct examination that for a period of time you were a member of the Seagate Harbor Police Department; is that correct, sir?

A. That is correct.

Q. And could you tell us when that was? When did you become associated the first time with Seagate Harbor Police Department?

A. August, 1978.

(p. 41) Q. August of '78.

And when did you leave full employment with the Seagate Harbor Police Department?

A. Around November.

* * *

(p. 42) Q. Okay. Now, you recall Detective Mark Jones over here?

A. Yes, I do, sir.

Q. And do you recall originally being interviewed by him on August 21st, 1984?

A. I thought it was either late August or early September.

Q. Okay.

A. Not to be specific on a date because I really don't remember.

Q. Well, if Officer Jones indicated in his report that it was August 21st, 1984, you have no argument with that, do you?

A. No, sir.

* * *

(p. 45) Q. Okay. And you indicated that you first became involved seriously with the - was it Columbo Crime Family?

A. Columbo Crime Family.

Q. In 1978, '79?

A. Seriously, I would say about around November, '78, just about the time I quit from Seagate.

(p. 46) Q. Just about the time you quit Seagate; is that correct?

A. Yeah.

Q. What is - you were an associate of the Columbo Crime Family?

A. That is correct.

Q. What is an associate of a crime family?

A. Well, when you first become involved in the family, naturally you can't be a big guy because nobody knows you. You've got to earn your way up, so you become an associate.

Q. Why don't you tell us what a "made-guy" is?

A. A "made-guy" is, you have the structure of the crime family; you have the boss. Beyond the boss, consigliori, which is the counselor. You have captains, and then you have soldiers, or soldier is a made-guy and under him, each soldier varies. Some have 10, some have 20, some have 2 associates that do their bidding for them.

Q. Okay. So you did bidding of some soldier in the Columbo Crime Family then?

A. A Captain.

Q. A captain. Oh, so you worked directly under a captain?

A. That is correct.

(p. 47) Q. Okay. And you worked for him at the time you were performing police functions; is that correct?

A. That is correct.

Q. Okay. Would it be fair then to say that in street terminology that you were kind of a rogue cop?

A. No, sir.

Q. Why not?

A. Because when I was out there, I did my job.

Q. I see. So when you put on the uniform, you enforced the law, but when you got off duty, you were a gangster?

A. That's correct, sir.

Q. And that didn't bother your conscience at all, did it?

A. No, sir.

* * *

(p. 48) Q. All right. You indicated that prior to going to Raybrook Prison you made some sort of a deal with the FBI through Agent Walter Tican; is that correct?

A. That is correct. After my sentencing.

Q. After your sentencing?

A. That's correct.

Q. But prior to going to Raybrook?

A. Yes, sir.

Q. Okay. And what was that - did somebody try to assassinate you at that time?

A. No, sir.

Q. Well, and when you went to Ticano, did you offer to give him all of this information you had voluntarily without any payment?

A. No, sir.

Q. When you went to Ticano, you offered to sell him information about your other associates; is that correct?

A. I volunteered to give him the information. He said that customarily you do get rewarded for your services but it depends on the information and how it could be verified, and the payments were always given (p. 49) behind time, not when you gave the information, but after they had the time to disseminate it.

* * *

Q. When for the first time have you ever testified before a jury concerning any cases you made for the FBI?

A. Jury or Grand Jury?

Q. A jury, a regular trial jury?

A. Trial jury, none yet, sir. They are not - they are still on calendar.

Q. Okay. So this is the first time that you have ever been required or called upon to actually testify at a trial concerning any information that you've given to the FBI; is that correct?

A. That's correct, sir.

* * *

(p. 51) Q. Now, you got to Raybrook around September the 20th, you spent about seven or eight days down in the hole, or in solitary, or whatever they call it.

A. Administrative detention they call it.

Q. Administrative detention.

(p. 52) And then you were put into the general population. Did Mr. Ticano, Agent Ticano from the FBI, ever have occasion to contact you up there at Raybrook Prison?

A. One personal interview.

Q. Okay. You say one personal interview. Was that the interview that took place on October 20th, 1983?

A. I don't remember the date, but we have did have one interview so that could be it.

Q. Okay. The day as I recall -

A. The dentist.

Q. - you were in the dentist chair?

A. Yes.

Q. Remember that day?

A. Yes, sir.

Q. Was that the first time you had a personal interview with Walter?

A. Yes, sir. In the prison.

Q. At the prison?

A. Yes.

Q. Okay. Prior to that day, had you made any telephone calls to Walter Ticano?

A. Yes, sir.

Q. And how often had you done that?

A. I usually called him at least a minimum of (p. 53) once a week, maybe more.

* * *

Q. Did anyone else up at the prison know you were a confidential FBI informant?

A. No, sir.

* * *

(p. 54) Q. Okay.

* * *

Wasn't there a point in time when Ticano told you to get more information concerning Fulminante's involvement in the homicide?

A. Yes, there was.

* * *

(p. 55) Q. Okay. And it was on the phone then that he told you to try to develop more information?

A. He says, "Get me something to look at."

Q. Okay. And then you went out and on one of your usual walks with Mr. Fulminante, you approached the subject of his telling you the true story?

A. That's correct, sir.

(p. 56) And the reason that you told him to tell you the true story was because he had told you stories prior to that; is that correct?

A. That is correct.

* * *

Q. And that was the only conversation that you recall having with him?

A. No. There were other conversations concerning, like, in generalities of it, that he was worried that Mesa was going to come and get him for it, and they were going to be waiting for him when he got (p. 57) out. And they were going to pick him up and bring him back.

* * *

(p. 63) Q. *** Okay. Mr. Sarivola, you have a group of men who are doing time in prison; is that correct?

A. That's correct, sir.

Q. Some of them have committed murder, burglary, robbery; correct? Extortion?

A. That's correct.

Q. If a prisoner, if a fellow prisoner is known to have sexually assaulted and murdered a little child, is he considered accepted by the general population or is he ostracized and possibly in danger from the general population?

A. The latter part, ostracized and possibly in danger.

Q. Okay. Thank you, Mr. Sarivola.

Now, do you recall when Mr. Fulminante was released from prison?

A. It was after the New Year. I don't remember the date, sir.

Q. Well, was it in the spring?

(p. 64) A. It was in the spring.

Q. Late spring? May?

A. I'd say somewhere around May.

Q. May of '84?

A. That would probably be correct.

Q. Okay. Did you have contact with Mr. Fulminante on the day he was released from prison?

A. Yes, I did, sir.

Q. How did that come about?

A. I picked him up in the city.

* * *

Q. Early evening. Were you alone or with (p. 65) somebody else?

A. With somebody else.

Q. Who were you with?

A. My wife Donna.

Q. Your wife Donna.

A. Who, at the time, was not my wife.

Q. Well, you were apparently - I believe that you indicated -

A. In June of '84.

Q. - in June of '84 that you began living with Donna?

A. No, I began living with her before that, but we didn't get married until June of '84.

Q. Oh, okay. Just a month after you both went over and picked him up at the Port Authority Bus Station approximately?

A. Approximately about a month or so, yeah. I believe it was June 24th, sir, that we -

Q. That you went?

A. Right.

* * *

(p. 68) Q. Okay. Now, you said that you recalled being interviewed by Mark Jones, and I think we agree that was on August 21st, 1984?

A. That's correct.

Q. That first interview, Mr. Scull was there?

A. Yes, sir, and another gentleman from his office. I don't recall his name. I have never seen him before or after.

Q. Okay. Do you recall at any time during that particular conversation with Mr. Scull and Detective (p. 69) Jones, ever mentioning to them anything about Fulminante claiming he had sexually assaulted the child prior to killing her?

A. No, sir, I did not.

Q. Do you recall ever mentioning during that initial conversation telling Jones or Scull that he said he had choked her or tortured her prior to killing her?

A. Yes, I do remember it.

Q. You did tell them that?

A. That's correct.

Q. And if Officer Jones does not recall that, or has not put that in his report, then he was incorrect?

A. Well, that depends on Mr. Jones, what he wrote.

* * *

(p. 75) Q. Okay. When did you go into the Protective Witness Program?

A. I was accepted in September, '84.

Q. Just so that you and I can remember these dates, Mr. Sarivola, more me than you, because I'm sure you're more aware of them, when did you first start, I guess, living with Donna, you know, rather than just (p. 76) dating her?

A. End of February, beginning of March.

Q. Of '83?

A. That's correct.

Q. You got out of prison the end of November, '82?

A. The day before Thanksgiving, 1982, so it would be the 27th.

Q. Okay. And then the next thing we talked about was Mr. Fulminante getting out of prison?

A. That's correct.

Q. And that was?

A. May.

Q. Of '83. But you call him Red, don't you?

A. That's correct.

Q. It's a lot easier to write than Fulminante.

Now, he had confessed to you sometime in or about October to November -

A. Right.

Q. - of '82 when he was in the prison?

A. That's what I said. That's what I said.

Q. And this is, of course, the ride to Penn. the same day?

A. Right.

Q. And then we have August of '84 you talked to (p. 77) Jones?

- A. Correct.
- Q. And June of '85 you talked to Barker?
- A. Correct.
- Q. And August - I'm sorry, yeah, August of '85?
- A. Sioux Falls.
- Q. Right.
- Q. Donna and you talked to -
- A. K. C. and Mark Jones.

Q. Right. Now, we have got the proper sequence in fact of time. Oh, we forgot one thing. When did you go into the Protective Witness Program?

A. That was in September of '84.

Q. Okay.

A. You got a space there?

Q. Yeah. Okay. So during this whole period of time, you and your wife never discussed the conversation that you had with Fulminante in October or November of '82, is that your testimony?

A. That is correct, sir.

Q. And from May of '83 your wife never discussed with you what Fulminante had said in front both you through August of '85?

A. No, sir, that's not entirely true.

(p. 78) Q. Okay. Then she did discuss something with you?

A. Well, at the end of the ride and when we were alone for a few minutes, we had went to the nightclub that I had a partnership in.

Q. After you returned from Penn.?

A. Right.

Q. Okay.

A. And she was, you know, she was telling me that she was very, very upset about it. She was very pissed off.

Q. All right. Now, by the way, during that period of time here from February, March, April, May of '83, were you a paid confidential informant to the FBI?

A. Yes, sir.

Q. Were you making continual reports to the FBI about certain activities of personnel -

A. Yes, sir.

Q. - that they might be interested in?

A. Yes, sir.

Q. Correct?

A. People that I was working with.

Q. Right. Did you report to Agent Ticano the fact that you were picking up Red, Lester Fulminante, the day that he got out of prison?

(p. 79) A. Yes, sir.

Q. You told Ticano that; correct?

A. Yes, sir.

Excuse me, sir.

THE COURT: Yes.

Q. BY MR. KOOPMAN: When you -

THE COURT: Hold on a minute. We'll take a short break at this time. The witness has asked to use the restroom.

We'll stand at recess for a few minutes, ladies and gentlemen. Please use the facilities for a few minutes.

(Whereupon, a recess was taken.)

THE COURT: All right. Let the record show the presence of the Defendant, both Counsel of record, and the Jury.

Mr. Koopman, you may proceed.

Q. BY MR. KOOPMAN: Yeah. If you recall, Mr. Sarivola, that August, '84 meeting with Officer Jones, that fellow right there -

A. Yes, sir.

Q. - was Mr. Scull present at that particular meeting?

A. Yes, sir.

Q. Was that the first time you met Mr. Scull?

(p. 80) A. First time I met Mr. Jones, too.

Q. Okay. So up until August of '84, you didn't even know Mr. Scull existed; correct?

A. That's correct, sir.

Q. All right. Now, we're looking at some of these dates and you indicated that except for - I think you said you had stopped at your nightclub -

A. On the way back.

Q. - when you got back from -

A. Right.

Q. - Pennsylvania; correct?

A. That's correct, sir.

Q. And at that point in time, your wife Donna said - made some comment about this - about Fulminante or about what Fulminante had said in the car?

A. That's correct.

Q. Okay. Did you make a report to Agent Ticano that Mr. Fulminante had, again, made incriminating statements concerning his involvement in the death of that little girl here in Arizona?

A. That's correct.

Q. You told them? When did you tell them?

A. I believe it probably was the next day.

Q. The next day. Did you tell them Donna was in the car?

(p. 81) A. No, sir.

Q. Why would you not tell them that Donna was with you?

A. Because I did not want her involved in it.

Q. Oh, I see. But you do recall telling him that he did make incriminating statements?

A. Right.

Q. Okay. The reason for that was you did not want to get her involved; is that correct?

A. That's correct.

Q. All right. Now, you gave some testimony concerning what Mr. Scull described as a doctored tape, do you recall that?

A. Yes, sir. Yes, sir.

Q. Well, if a doctored tape might mean that we - a true tape was made, and then that tape was fooled with?

A. Additions and subtractions.

Q. Right. Is that correct, is that the definition of "doctored" as far as you are concerned?

MR. SCULL: I'm going to object. I don't recall using the term doctored. I know I used the words false tape many times.

THE COURT: Okay. Overruled.

Q. By MR. KOOPMAN: So this was not a doctored (p. 82) tape, was it?

A. No, that's just a terminology that I was referring to it.

Q. Okay. In fact, what it was, was a completely false tape?

A. That is correct, sir.

Q. Okay. Except where you introduce yourself at the beginning of the tape and then Agent Ticano introduces himself at the end of the tape, that's true?

A. That's correct.

Q. That's correct. Oh, okay. And you indicated that the reason you did that was because you felt pressured by Agent Ticano and felt you had to give him something to keep him off your back?

A. No. I was giving him other information but he wanted this particular person done, and at that period of time, it was very difficult.

Q. Okay.

A. And I did it to get him off my back just like I said.

Q. By the way, that was February of '84?

A. That's correct.

Q. Correct?

A. '83, sir. February of '83. February, '84, I was in the Witness Protection Program.

(p. 83) Q. No, you didn't go into the Protected Witness Program on September, '84, according to what you told us?

A. September, yes, correct. Yes, it's '84.

Q. So it's February of '84?

A. I was thinking -

Q. Now, Mr. Scull asked you, did anything bad happen to the other person whose voice you imitated or tried to imitate on the tape; is that correct?

A. That is correct, sir.

Q. He asked - remember him asking you that?

A. That's correct.

Q. Well, if you eventually admit to the FBI that it was a false tape, and false information, they would have no reason to do anything to Mike about this tape; isn't that correct?

A. That's correct, sir.

Q. All right. Now, you indicated that right after you turned that tape over to Officer Ticano or Agent Ticano your conscience started to bother you?

A. That is correct, sir.

Q. And you didn't talk to Agent Ticano for sometime?

A. He called me. When he would call me, I would talk to him, would be very short and get off the phone with him.

(p. 84) Q. And he began, then, to feel, I think was your testimony, that perhaps there was something wrong in your relationship with him?

A. He knew what it was.

Q. He knew what it was. How do you know he knew what it was?

A. I just had that feeling. He knew what it was.

Q. Oh, okay. Did he ever say anything to you about that tape?

A. Yes, a few weeks down the road.

Q. A few weeks down the road? What did he say?

A. He asked me if I would - if I was sure that everything was okay with that tape, and I just refused to talk to him about it.

Q. Didn't you deny that there was anything wrong with that tape?

A. That's right.

Q. So you did not just refuse to talk to him about it?

A. No, but I had said, you know, everything is okay, just leave me alone about it.

Q. Okay. Didn't he tell you - by the way, doesn't he live in Hauppauge, Long Island?

A. I do not know where he lives.

(p. 85) Q. Okay. The conversation that falsified was that supposed to have taken place in Hauppauge?

A. No.

Q. Or in Long Island?

A. In Westbury.

Q. Westbury?

A. Westbury-Hicksville area.

Q. Is that correct?

A. Yes. That is correct.

Q. When in fact the tape was actually made in Brooklyn?

A. In Brooklyn, New York.

Q. Okay. And didn't there come a time when Agent Ticano confronted you and said, "Hey, pal," or words to this effect, "We have checked the background noises on this tape and we don't believe it was made in Westbury-Hicksville, Long Island"?

A. But that was after the first time he had spoke to me about it.

Q. And this is several weeks later?

A. Well, total yeah.

Q. And in all of that time, your conscience was bothering you; correct?

A. Correct, sir.

Q. And when he mentioned that he believed that (p. 86) the background noises were not those of the Long Island area but were of Brooklyn, did you then admit that you had made this phoney tape?

A. No, sir.

Q. Oh. Conscience was not bothering you that much, was it?

A. Still was.

Q. Okay. And then, have any more conversations with you about this tape?

A. A few, a couple of times on the phone.

Q. This is after he mentioned to you he didn't like the background noises?

A. Yeah, a couple of times undocumented, unofficial conversations that he would call and talk to me about it. And I still didn't want to come forward about it.

Q. Well, tell us how you came about to eventually admit that that was a phoney tape that you had produced yourself?

A. During a polygraph session.

Q. Okay. In fact, it was after you failed the polygraph that you finally admitted it; is that correct?

A. That's correct.

Q. Okay. And how much after the date of which your tape was originally given to Agent Ticano did you (p. 87) finally admit that it was a phoney tape?

A. I don't remember the date of polygraph, so, you'd have to refresh me on that.

Q. Well, I don't know the date of polygraph either, Mr. Sarivola. But you said it was about several weeks; several weeks, a month?

A. I'd say anywhere from a month to six weeks.

Q. Okay.

A. I failed on that point and passed on three other subjects.

MR. KOOPMAN: Judge, would you please direct the witness to please answer my questions, and not to give his free speeches to the Court.

THE COURT: Just answer the question that's asked, Mr. Sarivola.

THE WITNESS: Sorry.

Q. BY MR. KOOPMAN: Now, Mr. Sarivola, you then, of course, were interviewed we said, on August 12th, 1985; is that correct?

A. Yes.

Q. That was by Mr. Scull again and Mr. Jones again?

A. August 12th, no. It was in the 20's.

Q. Well, let me show you a copy of a police report that I have and perhaps that will help refresh (p. 88) your recollection.

A. Okay.

Q. August 12th?

A. August 12th.

Q. Okay, thank you. When for the first time or was this the first time that you told anyone that Mr. Fulminante drove the little girl into the desert on a motorcycle?

A. I believe so, yes, sir.

Q. That's the first time; isn't that correct?

A. Yes, sir.

Q. And this is the third time you're being questioned by Arizona people, and during this whole period of time, of course, you are in contact with the FBI?

A. Are you talking, sir, about the first interview with Mr. Jones, which I believe that you are talking about, or the third?

Q. No, I said August 12th, 1985. I pointed to it up here, Mr. Sarivola.

A. Okay.

No, that was not the first time.

Q. When was the first time you said that he went into the desert with a motorcycle?

A. I had told Special Agent Walter Ticano.

(p. 89) Q. When did you tell him that?

A. That was about three or four days after I got out of prison and we were discussing it.

Q. Okay.

A. Roughly that first Monday after Thanksgiving we met.

Q. So you discussed this case with Walter Ticano shortly after leaving prison?

A. That's correct, sir.

Q. And you told Walter at that time that Fulminante had taken the little girl out into the desert; is that correct?

A. That's correct, sir.

- Q. On the motorcycle?
- A. That's correct, sir.
- Q. Did you tell that to the Arizona people in August of '84?
- A. I believe so, sir.
- Q. Did you tell it to them in June of '85?
- A. Yes, sir.
- Q. And you told it to them again in August of '85?
- A. Yes, sir.
- Q. So you had contended all along -
- A. That's correct, sir. —
- (p. 90) Q. — that he took her out in the desert on a motorcycle?
- A. Yes, sir.
- Q. Did you tell Officer Jones on August 12th, 1985, that Fulminante had sexually assaulted the little girl prior to killing her?
- A. On June 12th, 1985?
- Q. August 12, 1985.
- A. Yes, sir I did.
- Q. The last — okay. And did you also tell him at that time that he made the child beg, and then shot her in the head?
- A. Yes, sir.

- Q. Okay. And you told that to — did you tell that to anybody before?
- A. I believe so.
- Q. Okay. Did you tell it to Ticano?
- A. Yes, sir. We discussed it in general, in more than generality. We have discussed it at length.
- Q. Specificity?
- A. Yes.
- Q. And this was sometime in November after Thanksgiving of '82?
- A. Right. We got together a few days after I got out of prison the following Monday because (p. 91) Thanksgiving was at the end of the week.
- Q. And you recall at this time telling that to Jones in your first interview in August, '84; correct?
- A. As far as I can remember, yes, sir.
- Q. And to Barker in June of '85?
- A. Yes, sir.
- Q. Okay.
- MR. KOOPMAN: Your Honor, may I have a moment to just gather, my —
- THE COURT: Sure.
- Q. BY MR. KOOPMAN: Mr. Sarivola, you indicated during your testimony that you received no payments from the FBI while you were in prison; is that correct?

A. Yes, sir.

Q. Do you recall when you first started getting paid by the FBI?

A. I would say somewhere around March or April of '83.

Q. Okay.

A. That's when I started working for them, so -

Q. All right. And when was the last payment that you received from the FBI? Would have been in September of '84 when you went into the Protective Witness Program?

(p. 92) A. Correct.

Q. And during that period of time, from April of '83 to September of '84, do you know how much money you actually received from the FBI for your information?

A. No, sir.

Q. Well, let me show you this document and see if this helps refresh your recollection. That's a document that I was given by Agent Ticano. Look at that and see if that helps refresh your recollection.

A. If this is what Special Agent Ticano said there was, then it must be what it was. I did not keep an accounting of that.

Q. And how much does the document allege that you were paid by the FBI for your information?

A. \$22,490.

MR. KOOPMAN: Thank you. May I have this marked, please? I think it's Exhibit No. 36.

MR. SCULL: No objection when it's offered, and we have a copy.

THE COURT: That's Exhibit 36?

MR. KOOPMAN: This is Exhibit 36.

THE COURT: Exhibit 36 is admitted.

Q. BY MR. KOOPMAN: Would you look at Exhibit No. 36 in evidence, Mr. Sarivola. Do you recognize that document?

(p. 93) A. Yes, sir. This is my formal agreement with the United States Government.

Q. Okay. Now, earlier on in your - by the way, is that your signature on the second page?

A. Yes, sir, that is my signature.

Q. And it's dated August 15th, 1984; is that correct, sir?

A. That's correct.

Q. Now, in earlier testimony on direct examination by Mr. Scull, you indicated that except for being paid, you received no other benefit for your information or your testimony; is that correct?

A. That's correct, sir.

Q. Let me ask you to do me a favor, Mr. Sarivola. Would you please read the third and fourth paragraph on the first page?

A. "It is further agreed that in the event that you are prosecuted" -

Q. No, above that; start with the paragraph above that.

A. "It is agreed that no information," that one?

Q. Yes.

A. Okay. "It is agreed that no information or testimony given by you (both before and after the making (p. 94) of this agreement), or evidence derived from information or testimony given by you, will be used against you in any criminal proceeding other than indicated below."

Q. Okay. And now read the next.

A. "It is further agreed that in the event that you are prosecuted by any other law enforcement authorities in connection with any violation of the law, this office will bring to the attention of those prosecuting authorities the cooperation which you have furnished in connection with this agreement."

Go on sir?

Q. Yeah, why don't you read the next paragraph?

A. "It is further agreed that this office will seek to place you in the Federal Witness Security Program along with your wife, children, and any other associates who become in need of protection as a result of your cooperation with this office."

Q. Now, let me ask the question again, Mr. Sarivola, now that you've had a chance to refresh your recollection with this document.

Have you received as a condition of your cooperation with the FBI in the investigation of organized crime or other criminal activity, any other benefits other than the \$22,490 you received in cash?

A. In what respect, the Witness Protection (p. 95) Program?

Q. You got the Witness Protection Program for yourself and your wife's children?

A. That was necessary to maintain life.

Q. Okay. You also received a promise that they would not prosecute you for any information derived from the information which you gave them; is that correct?

A. That is correct.

Q. You also received a promise that if you were arrested by any other law enforcement agency for any other crime, is the words here, that they would, the FBI would go and they would tell them what a good fellow you are and how you've cooperated in furnishing information pursuant to this agreement; is that correct?

A. That is correct.

Q. Don't you consider that benefits?

A. No, sir.

Q. Well, let me ask you this then. Aside from the extortion charge for which you were convicted and sentenced to prison, does the FBI have any information about you concerning your involvement in any other crimes or criminal activity?

A. No, sir.

THE COURT: Did you have -

MR. SCULL: I had an objection. Obviously, (p. 96) judge, the witness answered. I just don't - we can't open the FBI files.

THE COURT: The answer will stand.

You may ask your next question.

MR. KOOPMAN: Thank you, Your Honor. I have no further questions of this witness.

* * *

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA,)
Plaintiff,)
vs.)
ORESTE C. FULMINANTE,)
Defendant.)

CR-142821

Phoenix, Arizona
December 12, 1985
1:35 o'clock p.m.

BEFORE: THE HONORABLE STEPHEN A. GERST,
JUDGE

Reporter's Transcript of Proceedings
Volume VII - Trial

* * *

(p. 5) WALTER TICANO,
called as a witness herein, having been first duly sworn,
was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SCULL:

Q. Would you state your name and occupation,
please, sir?

A. Walter Ticano, Special Agent, Federal Bureau of Investigation.

(p. 6) Q. During your employment with the FBI, did
you come to know a man named Anthony Sarivola?

A. Yes, I did.

Q. And can you tell us when you first met or came to know Anthony

A. I first became aware of Anthony Sarivola approximately September of 1982. He became involved in a case that I was pursuing. He was involved in shylarking (p. 7) and subsequently he was arrested in my case for shylarking.

Q. Could you define shylarking for us, please?

A. It's an extortionate credit transaction in which exorbitant interest rates are charged for a loan.

Q. And he was subsequently convicted of that charge -

A. That's correct.

Q. - was he not, and went to prison, didn't he?

A. Yes, he did.

Q. All right. At some time, did Anthony Sarivola come to you, and make you some sort of proposition that he would furnish information to you concerning organized crime figures?

A. Yes, he did.

Q. And did you enter into some agreement with him?

A. Yes, I did.

Q. And this is with the approval of your Bureau, was it?

A. That's correct.

Q. Was this before or after he went to prison?

A. He came to me after he was sentenced for his crime, but before he went to prison.

(p. 8) Q. Did you have any impact on what kind of prison sentence he received at that time?

A. No, I did not.

Q. And when he went to prison, did he - was he in your employ at that time, could we say, or was he working with you at that time?

A. He was still a confidential informant.

Q. And did you have contacts with him while he was in prison?

A. Yes, I did.

Q. And were some of those in person and some of those telephonic?

A. That's correct.

Q. Now, you, from time to time, file reports as part of your job, do you not?

A. Yes, I do.

Q. I want to refer you to what purports to be a report of yours. Is that true, what that is?

A. Yes, this is my report.

Q. And what is the date of the report?

A. Well, the date of transcription, the date it was typed was November 1st, 1983. However, the information was provided to me approximately October 20th, 1983.

Q. You say approximately?

(p. 9) A. Well, it could have been the day of the 20th or the a.m. of the 21st.

Q. All right. And do you have a personal recollection now as you sit on the stand of receiving this information?

A. Yes, I do.

Q. And would you state what information you received from Tony Sarivola?

A. Tony contacted me by phone, and told me that he had engaged in a conversation with Oreste Fulminante in which Fulminante told him that he had killed his daughter, and that he used a .357 magnum to kill his daughter.

Q. All right. Did you get any more details than that at that time?

A. No, I didn't.

Q. Why didn't you?

A. The prison telephones were spot monitored by the corrections offices so normally when we'd have a conversation, it had to be very quick, and, you know, just conducted business as quickly as possible, and get off the phone.

Q. All right. Were the prison authorities aware that Mr. Sarivola was an informant for the FBI?

A. Absolutely not.

(p. 10) Q. Was he able to furnish you other information at that time from the prison?

A. Yes. He was gathering information about people and from people who were up in the prison with him, and also, he was in, you know, telephone contact with people back in Brooklyn and he would relay some of that information to me about Brooklyn, as well as the prison.

Q. All right. What was the credibility of that other information that he gave to you at that time?

MR. KOOPMAN: Objection, Your Honor, irrelevant.

THE COURT: Overruled. He may testify to the general credibility of other information.

THE WITNESS: Information I received from Tony, most of the information was verified from independent investigation or from other source information, source information meaning other informants, and a certain small percentage of that remained unsubstantiated because we weren't able to verify it.

Q. BY MR. SCULL: Are you saying that you couldn't verify it or disprove it either way?

A. That's correct.

Q. And that's a small percentage you said. All right.

(p. 11) When Mr. Sarivola then came out - well, let me - first of all, did you ask him, at that time, of this report, to go back and try to find out more about what was going on with this -

A. Let me just back track a moment. Prior to October 20th, and I don't have the dates because no report was made of it; sometime early in October, he told me on the phone, "Do you know who I'm up here with?"

And I said, "No, what do you mean?"

And he said, "Well, there's some guy up here that has killed his daughter."

And I said, "Well, you know that I don't know anything about it. Why don't you see if you can find out more about it and report it back to me."

Q. So that was the report back to you that you made the reference to?

A. Yes.

* * *

(p. 12) Q. *** After Mr. Oreste Fulminante (sic) was released from prison, did you keep in contact with him?

A. With Tony?

Q. Yes.

A. Yes, I did.

Q. Did he return to the Brooklyn area?

A. Yes.

Q. And was he working for your agency as a confidential informant?

A. He continued to be a confidential informant.

Q. And did you pay him something for his services?

A. We paid him expenses and we also paid him for information. We called it C.O.D. Afterwards, we (p. 13) verify the information; we pay them for that information.

Q. And so you did make payments to him; is that correct?

A. Yes. Yes.

Q. And is that only for information that you were able to verify from other sources?

A. Yes.

Q. There came a time, did there not, Agent Ticano, that Mr. Sarivola provided you with a phoney tape recording?

A. Yes, he did.

Q. Do you recall approximately when that was?

A. January of 1984.

Q. Do you recall any of the circumstances of your receiving that phoney tape?

A. Yes. Tony was involved in numerous things, but particularly we had this one operation against this fellow, Mike, and it was moving very slowly at the time.

And I was receiving pressure from my boss, and so I kind of leaned on Tony to accomplish, you know, the task that we had set out to do, and I guess he felt pressured, and he created a conversation with this guy Mike.

Q. All right. You received this tape from Tony, right?

(p. 14) A. Yes, I did.

Q. And you listened to it?

A. Yes.

Q. What was your reaction to it when you first heard it?

A. Okay. After I received the tape, it was about three or four days later when I was able to actually listen to it in cassette form. And my first reaction to it was that the background noise and the - just wasn't consistent with where that tape recording was supposed to have been made.

It was supposed to have been made in a Brooklyn street and I was just - I was suspicious of the tape.

Q. What did you do about it?

A. Well, I confronted Tony about it and I gave him the opportunity to tell me that it wasn't real and he insisted that it was real.

Q. Do you recall about how much time expired between your listening to the tape and then asking Tony about it?

A. Probably about a week. And then -

Q. I'm sorry.

A. I'm sorry.

Q. What happened to your relationship with Tony (p. 15) during this period?

A. He kind of went his own way, and he was avoiding me. I was avoiding him. You know, there was something wrong. And we were both aware of it.

Q. All right. But sometime, you brought this to a head, I assume?

A. Yes. I initiated a polygraph examination. And not myself personally but, you know, somebody who is a technician.

Q. And what happened to him?

A. Well, he took the test and he failed it. He continued to insist that it was a real tape.

Q. And did you confront him then with those results?

A. Yes, sir. He then admitted that he lied.

Q. All right. So did he continue to work for the Bureau after this time?

A. Yes, he did.

Q. And was he still providing information C.O.D. as you referred to it?

A. Yes.

Q. And did he provide - actually do that? He actually did provide information?

A. Excellent information.

Q. Was Tony able to be helpful to the Bureau as (p. 16) far as making any major cases?

A. The cases are still in progress, and there are since investigations, but he will be called upon to testify in these cases.

Q. And what are we talking about here; are these high ranking people or not?

A. We're talking about soldiers, and captains, and the various organized crime families.

Q. And is it fair to say that he's helpful to you in several or many cases?

A. He's provided testimony to various agents in approximately 10 to 15 cases.

Q. And what kind of cases are we talking about?

A. We're talking high level organized crime cases.

Q. Are we talking about shaftlifting, or -

A. No, we're talk murder, shylarking, hijacking -

Q. Major cases?

A. - et cetera. The normal.

Q. I think you paid through your Bureau some twenty-two thousand four hundred and some odd dollars if I remember the round figure. Was all of that payment for information that was verified or corroborated in some way by you?

(p. 17) A. Not all of it because part of that is expenses that he would incur in, you know, running around town, whatever he had to do; gasoline, car rentals, phone calls, meals, nights out on the town with his buddies. You know, stuff like that.

Q. All right. And the rest of the money went for verified information; is that correct?

A. That's correct.

Q. It's also true that Tony has received some benefits from the Federal Witness Protection Program, is that not true?

A. That's correct. He's a member of the Federal Security Program.

Q. All right. And I think there's also another benefit that if he would be prosecuted by any other law enforcement authorities, your office would bring to their attention his cooperation with you in the past?

A. That's right.

Q. And that you wouldn't use evidence that you secured from him to prosecute him with, is that true?

A. That's right.

Q. Are there any other agreements that we don't know about?

A. None with the FBI that I'm aware of.

* * *

(p. 18) CROSS-EXAMINATION

BY MR. KOOPMAN:

(p. 20) Q. * * * Agent Ticano, you've just been given a document that I have asked you to look at, is that correct, sir? What is the date of that document?

A. 10-20, 1983.

Q. Okay. And the information contained in that document, was that received from Mr. Sarivola?

A. Yes, sir.

Q. Was that received by phone or in person?

A. In person.

Q. And was that actually on October the 20th?

(p. 21) A. Yes, sir.

Q. I mean, that wasn't maybe the 20th or maybe the 21st?

A. It was the 20th.

Q. It was the 20th. Now, do you have the other 20th document there?

A. Only this.

Q. That one, okay.

MR. KOOPMAN: May I ask that this document be marked, please?

Q. BY MR. KOOPMAN: I'd like to show you a document that's been marked as Exhibit No. 37 and ask you if you recognize that document?

A. Yes.

Q. And I believe that Mr. Scull asked you the date upon which you received the information, upon which that document was based?

A. Yes.

Q. Is that correct?

A. Uh-huh.

Q. Is that correct, sir?

A. That's correct.

Q. And you indicated, at that time, that even though it says October 20th, that it could have also been the morning of October 21st; is that correct?

(p. 22) A. That's correct.

Q. And is that - well, I'm going to ask you: Thinking back, was that information garnered by you from Mr. Sarivola the night of the 20th or the morning of the 21st?

A. I received a phone call in the a.m., which would have to have been the 21st.

Q. Okay. Agent Ticano, do you recall being interviewed by me on October the 21st, 1985?

A. Yes, sir.

Q. Do you remember us talking about exactly this same situation?

A. Vaguely.

Q. I'm going to read to you from page 18 of that document, of the transcript report of our recorded conversation and see if this helps refresh your recollection.

"Walt Ticano: Now I think it was October 20th is the day that I actually went to Raybrook on an unrelated matter and sat down with Tony and had a discussion. At that time, he gave me a bit more about it, and I said, look, I gotta know the whole story. Get me the whole story.

"Koopman: Okay.

(p. 23) "Walt Ticano: Ask him what it's all about and then I get that information by telephone that night. Those documents may be a little bit misleading about the dates because I was traveling up there, I was actually there and then there was a subsequent phone call in addition to that."

Does that help refresh your recollection as to when you received the call from Tony?

A. I said before you started to read from this communication that I had received the call in the a.m. of the 21st, which is the night of the 20th. It's the night, right? It's dark out.

Q. I'm sorry, what time in the morning are you referring to?

A. Probably 12:15, 12:30 a.m.

Q. Okay. So we're talking shortly after midnight of the 20th?

A. Thereabouts.

Q. Thank you. Now, I'd like you to again look at that document and tell me if you prepared that document?

A. I didn't type it.

Q. Did you -

A. I wrote it. In essence, I wrote it, yes, sir. Yes.

(p. 24) Q. And you checked it over after it was typed?

A. That's correct.

Q. And does that contain what you recall of your conversation with Mr. Sarivola on the early morning hours of the 21st?

A. That's correct.

Q. And is that document kept in the ordinary course of business of the FBI?

A. Yes.

MR. KOOPMAN: Your Honor, at this time, I would offer No. 37 into evidence.

MR. SCULL: No objection.

THE COURT: Exhibit 37 is admitted.

Q. BY MR. KOOPMAN: Now, I'd like you to look at the document, Agent Ticano. In fact, would you read the paragraph that refers - the second part of the paragraph - I'm sorry, the second paragraph which refers to the information you received from Sarivola.

A. Sarivola telephonically advised me that Oreste Fulminante told him in confidence that he, Fulminante,

had killed his stepdaughter. Sarivola said that Fulminante said that he did not like his stepdaughter and accused her of causing problems between himself and his wife. Sarivola stated that Fulminante stated that he took his stepdaughter out into the Arizona (p. 25) desert and killed her with a .357 magnum handgun.

Q. Okay. Now, you indicated that you've been with the FBI some nine and a half years?

A. Yes.

Q. And you've been in organized crime for five years?

A. Yes.

Q. And you've been to a number of in-service training programs, correct?

A. That's correct.

Q. And you, of course, went through the FBI Academy, which is a rather lengthy study period?

A. Yes.

Q. And you were taught investigative techniques, were you not?

A. Yes.

Q. You were taught report writing, were you not?

A. Yes.

Q. On that night, when you received the telephone call from Mr. Sarivola, did Mr. Sarivola ever indicate to you that Mr. Fulminante indicated he had sodomized or raped the child?

A. No.

Q. Did Mr. Sarivola ever indicate to you that (p. 26) night in that telephone call that Mr. Fulminante had choked or tortured the child prior to shooting her in the head?

A. No.

Q. Did Mr. Sarivola ever indicate to you that night that he drove the child out to the desert on a motorcycle?

A. No.

Q. Okay. Now, I believe in our interview I asked you whether or not there were other documents or reports relating to information you had received from Sarivola concerning Fulminante's participation in the murder of Jeneane Hunt; is that correct?

A. That's correct.

Q. And you indicated to me that there were no others?

A. That's correct.

Q. And I believe you also indicated to me that - you had received no additional information from Sarivola outside of what was in that report, because had you received additional information, you would have put it in the report?

A. That's correct.

Q. Is that right?

A. Absolutely.

(p. 27) Q. So would it be fair to say that up and until the time that Sarivola made contact, the original contact with Maricopa County, whether it was K. C. Scull or this officer over here, Officer Jones, he had never said to you, "Fulminante told me he raped or sodomized the girl;" is that correct?

A. That's correct but I never pursued it, either. Because now -

Q. Mr. Ticano, just -

MR. KOOPMAN: Please, Your Honor, would you ask him to just answer my questions.

THE COURT: Just answer the question that's asked of you.

Q. BY MR. KOOPMAN: Agent Ticano, did Sarivola ever say to you prior to his being questioned by people from Maricopa County, "Hey, Walter, Fulminante told me he raped or sodomized the kid before he killed her"?

A. No.

Q. Did he ever tell you, "Hey, Walter, before Fulminante killed the girl, he choked or tortured or strangled her"?

A. No.

Q. And if he had, you would have put in a report about that; is that correct?

A. That's correct.

(p. 28) Q. And you've given me all of your reports; is that right?

A. You have everything.

Q. There's nothing in any of those reports that reflect on any such statements being made by Sarivola?

A. No.

Q. Correct, okay. Now, you also talked about his general credibility while he was up at the jail and giving you information; is that correct?

A. Yes.

Q. And you said that most of the information you were able to substantiate, but some of it you were unable to substantiate?

A. That's correct.

Q. Therefore, would it be fair to say those areas that you did not substantiate, you cannot sit there and absolutely say, without any doubt whatsoever, were true?

A. I can't.

* * *

(p. 30) Q. Now, Mr. Sarivola, during the time that he was actively involved as your paid, confidential informant, was - on occasion, made tape recordings of telephone conversations of people; correct?

A. Yes.

Q. And on at least one occasion that we know of, had tape recorders or wires available to him to tape record conversations between him and other parties; is that correct?

A. That's correct.

Q. At any time, with this availability of electronic recording devices available to him, was he ever able to record either by telephone, or in any other way, any conversations with Mr. Fulminante which related to the death of Jeneane Hunt?

A. No.

Q. By the way, are you familiar with the term snitch or stoolie?

A. Yes.

Q. Is that a common term both in law enforcement and among the general population to be used when talking about a paid, confidential informant?

(p. 31) A. It's more of a street term than a professional term.

Q. A street term, but you have heard it?

A. Yes.

Q. Okay. You indicated that there are a number of cases, important cases to the FBI and the Justice Department, which Mr. Sarivola is involved in; is that correct?

A. Yes, sir.

Q. And do you have the August 15th letter up there? I believe it's marked No. 36.

I'll show you what has been marked Exhibit No. 36 in evidence, and ask you to refer to paragraph 2 thereof. And it indicates in paragraph 2, does it not, Agent Ticano, that the office of the United States Department of Justice

is conducting an investigation of illegal activities on the part of members and associates of the Colombo Organized Crime Family, as well as illegal activities on the parts of members and associates of the Gambino, Genovese, and Lucchese Organized Crime Families; is that correct?

A. That is correct.

Q. And those are four out of the five major crime families in New York City, are they not?

A. They are.

(p. 32) Q. And apparently Mr. Sarivola, without getting into it, because I know it's confidential information at this time, has been supplying you with information concerning all of those crime families and high ranking members of those crime families; is that correct?

A. Yes, sir.

Q. And, in fact, he has testified before before grand juries; is that correct?

A. Yes.

Q. And he'll probably be testifying against a lot of these people if their cases go to trial in New York; is that correct?

A. He will.

Q. Would it be fair to say that his credibility as a witness is very crucial to the prosecution of those cases?

A. Absolutely.

Q. Okay. By the way, when Mr. Sarivola came to you and offered to be a paid informant for the FBI, did he

give you or did you require of him certain information concerning his background so that you could check it out?

A. Yes.

Q. And one of the areas that we spoke about yesterday with Mr. Sarivola was his prior employment with the Seagate Police Department.

(p. 33) Do you recall his being a member of that department or saying he was a member of that department at one time?

A. That's correct.

Q. Did you ever check out his employment record with Seagate Police Department?

A. Yes, I did.

Q. Did you make a determination as to how long he was with that department?

A. Yes.

Q. How long was he with them?

A. Eight months with Seagate.

Q. With Seagate. Do you recall whether in your investigation of his prior employment at Seagate whether he had received any citations for bravery?

A. He received citations. I don't know whether they were for bravery or not.

Q. You were able to verify this through record employment?

A. I was in recent conversations with the United States Attorney that prosecuted Sarivola and his recollection is that there were at least two citations.

Q. Two. Thank you.

Let's go back to that No. 37 there again, will you, please?

(p. 34) A. Okay.

Q. I think it's 37. No, I'm sorry, 36. The other one.

A. Okay.

Q. In your debriefing of Mr. Sarivola, did he admit to you that he had been involved in criminal activity with other parties in the Columbo Crime Family?

A. Of course.

Q. Now, you were the arresting officer in his case on extortion, were you not?

A. I was the case agent. I didn't actually make the arrest.

Q. Okay. Well -

A. Responsible for.

Q. You were responsible for his arrest, were you not?

A. Yes.

Q. Okay. So you knew about that particular crime because you were responsible for his arrest?

A. Yes.

Q. Okay. When was that?

A. September of 1982.

Q. September of '82. Well, yesterday in testimony, Mr. Sarivola indicated to us that when he left the Seagate Police Department - by the way, do you know (p. 35) why he left the Seagate Police Department?

A. He resigned.

Q. Okay. He told us yesterday that he resigned from the Seagate Police Department so that he could participate more fully in criminal activities.

A. That's what he told me as well.

Q. Okay. Now, it would appear from the contents of this letter that in order for him to receive the protection spoken about, he had to relieve his soul to you, so to speak?

A. That's right.

Q. Tell you folks all the criminal activity he had been involved in?

A. That's correct.

Q. And the persons that he was involved with in those criminal activities; correct?

A. Yes, yes.

Q. Are you aware at the present time sitting right there, aside from that one case that you arrested him for, of any other criminal activity on the part of Anthony Sarivola?

A. Yes.

Q. I'm finding it very difficult to phrase my questions because I don't want to get into confidential areas.

(p. 36) Would it be fair to say because of Mr. Sarivola's position in the Columbo Crime Family that his participation in criminal activity was somewhat substantive?

A. Yes.

Q. Would you go down to - let's see, one, two, three, four; I'm sorry, three; the third paragraph in that letter. Is it your understanding from that paragraph that the agreement with the government is that they will not prosecute him, Tony, for any prior crimes to which he has already admitted?

A. As long as he's admitted criminal activity in the past, he'll not be prosecuted for it.

Q. Okay. Now, go down to the next paragraph. It says there, "It is further agreed that in the event that you are prosecuted by any other law enforcement authorities in connection with any violation of the law," and I stress "any violation of law, this office will bring to the attention of those prosecuting authorities the cooperation which you furnished in connection with this agreement." Is that what that said?

A. That's what it says.

Q. Okay. Does that also include murder?

A. It just says, it will bring it to the attention of the authorities. That's all it says.

(p. 37) Q. I'm asking what does any mean?

A. Any crime.

Q. Any crime, including murder. All right.

By the way, talking about Anthony Sarivola, you indicated that he was originally arrested for extortion?

A. Extortionate credit transaction. Shylarking.

Q. Shylarking. And you indicated that shylarking by your definition means lending people money at exorbitant rates of interest?

A. Yes.

Q. Does shylarking also include, just from its connotation, the use or threat to use physical force in the collection of the grease, I think that's the term used in the interest; vigorish is another term; correct?

A. Correct.

Q. Of the collection of those moneys?

A. That's automatically understood.

Q. That there is usually force or threats to use force connected with shylarking?

A. That's correct.

Q. Okay. Would it be fair to say, without going into details, from information that you developed during your investigation that led to the arrest of (p. 38) Anthony Sarivola, that he indeed did use force or the threat of physical force in the collection of shylarking debts?

A. Yes.

* * * *
REDIRECT EXAMINATION

BY MR. SCULL:

Q. After Anthony Sarivola told you about Oreste Fulminante's confession to him, was it - did you follow up and attempt to make the case against Oreste Fulminante, or what did you do?

A. No. My function as the handling or case agent of an informant is to disseminate that information to either the various squads of the FBI or to outside agencies that it pertains to and it's their responsibility to follow up on that information; not mine.

(p. 39) Q. In this particular case, was the information concerning his confession to Sarivola given to the Arizona authorities?

A. That subsequently was. Approximately three weeks later, it was provided to Mark Jones.

* * * *
RECROSS-EXAMINATION

BY MR. KOOPMAN:

Q. Did you ever receive any information from Sarivola concerning his picking up Oreste Fulminante after Fulminante was released from prison?

(p. 40) A. Yes.

Q. Did he advise you that he picked him up at the bus stop, at the bus station and drove him to Pennsylvania or did he advise you that he went to Pennsylvania and drove him from Pennsylvania to New York?

A. He advised me of both.

Q. Okay. Did you - what did he tell you when he told you that he picked up Fulminante and drove him to Pennsylvania?

A. Nothing.

Q. That's it? Did he tell you that Donna was in the car with him on the ride down to Pennsylvania?

A. I - no.

Q. Did he tell you that Mr. Fulminante had once again confessed his implication in the death of the little girl?

A. He may have mentioned it, and if he had mentioned it, I wouldn't have made a report of it, because it would have been the same information.

Q. Okay. Unless he told you something -

A. Something additional.

Q. - additional like admitted to raping her or he admitted to choking her or torturing her or something like that?

A. That's right.

(p. 41) Q. Okay. How about the report of his picking up Fulminante and driving him back to New York; did he indicate to you whether Donna was with him on that occasion?

A. Not that time. I found out later that she had been with him.

Q. Okay. When he told you about that ride, did he ever mention anything new concerning Mr. Fulminante's - any additional information Mr. Fulminante gave relative to the death of Jeneane Hunt?

A. My best recollection of that whole thing is that he gave me nothing further.

Q. Did he ever mention to you at that time that Fulminante had made statements in front of Donna?

A. No.

* * *

IN THE SUPERIOR COURT OF THE STATE
OF ARIZONA IN AND FOR THE
COUNTY OF MARICOPA

THE STATE OF ARIZONA,)	
Plaintiff,)	
vs.	)	CR-142821
ORESTE C. FULMINANTE,)	
Defendant.)	

Phoenix, Arizona
December 13, 1985
1:36 o'clock p.m.

BEFORE: THE HONORABLE STEPHEN A. GERST,
JUDGE

Reporter's Transcript of Proceedings
Volume VIII - Trial

(p. 5) DONNA SARIVOLA,
called as a witness herein, having been first duly sworn,
was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SCULL:

- Q. Would you state your name for us, please?
- A. Donna Sarivola.
- Q. And are you married, Donna?
- A. Yes, I am.
- Q. Who are you married to?

- A. Tony Sarivola.
- Q. And where were you born, Donna?
- A. In Brooklyn, New York.
- Q. When were you born?
- A. October 30th, 1951.
- Q. Do you have any children, Donna?
- A. Yes, I do.
- Q. How many?
- A. One.
- Q. What sex and age is she?
- A. She is a little girl and she's six years old.
- Q. Donna, when did you first meet Anthony or Tony Sarivola?
- (p. 6) A. About 14 years ago.
- Q. And at that time, you were each married to other people, were you not?
- A. Correct.
- Q. You were just friendly or just describe your relationship?
- A. Oh, the four of us were very good friends.
- Q. And eventually, you got a divorce, did you?
- A. Yes, I did.
- Q. And he was apparently divorced from his wife?

A. Yes.

Q. When did the two of you start to go together or live together or however your relationship started?

A. Well, we started dating; it was approximately March of '83. 1983, I'm sorry.

Q. 1983?

A. Yes.

Q. And when were you married?

A. In June of '83. June 29th to be exact.

Q. So you've been married two and a half years approximately?

A. Yes.

Q. Okay. Donna, when you first started going with Anthony Sarivola, was he involved in any illegal (p. 7) enterprises to your knowledge?

A. Yes, sir.

Q. And do you know generally what that was that he was involved in?

A. Well, it's call shylarking back East where we come from. It's people that loan money out on the street at a higher percentage.

Q. All right. So you knew he was involved in this to some extent?

A. Yes, sir.

Q. Did he discuss his business dealings with you?

A. No, sir.

Q. Okay. Why did you start to go with this man if he was involved in criminal activities?

A. Well, I knew him for years and I knew the person, not what they call the street person, but the person he truly is and which is a totally different person.

And I just felt that we could have a good life together. I knew I couldn't influence him enough to change his ways, become a legitimate, so to speak, person.

(p. 8) Q. * * * Mrs. Sarivola, did there come a time when you were introduced to a man named Oreste Fulminante?

A. Yes, sir.

Q. Is he present in the courtroom today?

A. Yes, he is, sir.

Q. Could you point him out and describe what he's wearing for us, please?

A. Sure. He's the gentleman sitting at the far end of that table, I guess; wearing, I guess you would call it a plaid shirt with eye glasses.

MR. SCULL: May the record reflect further identification of the Defendant, please?

THE COURT: It may.

Q. BY MR. SCULL: Do you recall approximately when it was that you were introduced to this man?

A. Yes. It was in May or maybe the beginning of June, 1983.

Q. And do you recall the circumstances of being introduced?

(p. 9) A. Yes, sir.

Q. Okay. How was this man introduced to you? I mean what name was given?

A. Red.

Q. Okay. And who introduced him to you?

A. Anthony did.

Q. Was anyone else present at that time?

A. No, sir.

Q. And where was it that the introduction was made?

A. In Anthony's car.

Q. And where were you going in Anthony's car to?

A. To drop Red off in Pennsylvania at a friend's house.

Q. Okay. How had you gotten to the car?

A. Okay. Anthony had picked Red up in Manhattan and they drove into Brooklyn and called me. Anthony had called me and asked me if I would take a ride with him, that he had picked up Red and he was going to drive him out to Vince in Pennsylvania.

Q. And so, you apparently agreed to go along?

A. Yes, sir.

Q. And do you recall what time of the day this was approximately?

(p. 10) A. It was about 4:00 or 5:00 o'clock in the evening.

Q. Okay. And you then proceeded to drive to Pennsylvania. Did you have any conversations with Mr. Fulminante?

A. Oh, Yes.

Q. And would you describe those for us?

A. Sure. The beginning conversations were, you know, "Hello, how are you?" Then we went on to conversations - I refer to him as Red. That's the only way I was ever introduced to him.

Q. All right.

A. Red was saying that, you know, he wanted to make some money. He would like to get a nice car like Tony's. He wanted to know what was going on in the street at the time.

And then I just casually asked him why was he going to Vince DeMarco's house, you know, "Don't you have any relatives that you would want to go see once you get out of prison?"

I couldn't understand why he was going to Vince's house. And he had said he had relatives and he had friends, but that he couldn't go back to where he came from.

Q. All right. Proceed. Tell us.

(p. 11) A. Okay. I then asked him why couldn't he go back. And he had told me about a little girl that he had killed, but that one day, he was going to make it his business to go back there because he wanted to go piss on her grave. And I -

Q. Wait.

A. I'm sorry.

Q. Did he use those words?

A. That's a direct quote. That's a quote I'll never forget. It was a direct quote saying, "I want to go piss on her grave."

Q. Did he ever mention where this was?

A. He never mentioned the State per se.

Q. That it was this state, Arizona?

A. Yes, sir.

Q. Okay.

A. Right. Right. I had asked him what happened. He told me that he had taken her out into the desert, that he had raped her, that he had beat her. Another direct quote was that he had "choked her until he thought he choked every last breath out of her." And he then shot her. I don't remember if it was two or three times in the head.

He said that he had then gone home and his wife had been out at the time, and that when the wife had (p. 12) gotten home, he took the wife out to another part of the desert to look for her and that he couldn't find her.

Q. A totally different part from where he had -

A. Right, right.

Q. Did he ever mention torture?

A. Yes. But I couldn't go into what he meant by that.

Q. Did he ever mention making the girl beg?

A. Yes, sir, he did.

Q. Did you ask him any of the details as to what he was telling you?

A. No, sir I didn't. I was just so thoroughly disgusted by what I heard. I was not expecting to hear anything like that. No, I really didn't go into detail.

Q. Well, what did you feel like?

A. What did I feel like? I felt thoroughly disgusted and I turned around - please pardon my language - I told him that I thought he was nothing but a piece of shit, that I couldn't understand how anybody can do this.

Q. Did he ever tell you why he did it?

A. Once again, please pardon my language; this is a direct quote. Every time he spoke about this little girl, he kept calling her "the fucking little kid that (p. 13) had got in the way of him and his wife."

And I said, "What do you mean by that?"

And he had said, "Well, the kid, the fucking kid was always there and always in the way." They couldn't have the freedom of like a newly married couple, because of the f'ing kid.

Q. Donna, this was in May or early June, I think you said of 1983?

A. Yes, sir.

Q. And when did you first come forward with this information to the Arizona authorities?

A. Anthony had been at a meeting with you people in Lexington, Kentucky, and he had called me from there one night and he had said to me, "Gee, do you remember that conversation that we had in the car where Red had told me about what he had done?"

And he said, gee, it had slipped his mind. He said, "Would you mind if I told K. C. Scull about this?" You know, would I be willing to testify?

And I said, "Sure, tell him." And then he told you about it.

Q. When Mr. Fulminante was giving you this confession, did you believe him when he told you this?

A. Yes, I did.

* * *

(p. 14) CROSS EXAMINATION

BY MR. KOOPMAN:

* * *

(p. 16) Q. Now, you indicated that you first heard this statement from Mr. Fulminante in May or possibly early June of '82; is that correct?

A. No. '83.

Q. I'm sorry, '83, correct?

A. Yes, sir.

Q. Okay. When for the first time - when for the first time did you speak to Mr. Scull or Mr. Jones and tell them what you told this jury today?

A. Okay. It was the meeting after Tony had with them in Lexington, Kentucky. I do not remember the (p. 17) exact date or month. I can tell you where it was; it was in Sioux Falls.

Q. Well, perhaps I can help refresh your recollection here. I have a report here that indicates that you were interviewed the first time on August 13th, 1985?

A. Fine.

Q. Would that be correct?

A. Yes, sir.

Q. It was earlier this year?

A. Yes.

Q. August of '85 - well, let's see. That's a little over two years; is that correct?

A. Yes, sir.

Q. That call from Lexington, Kentucky, that was in June of '85, was it not?

A. I'm really not sure of the exact date.

Q. It was -

A. Approximately, yes.

Q. It was shortly before you were interviewed; is that correct?

A. Yes, yes.

Q. Well, if Tony told us, admitted it was June of '85

A. I don't know what Tony said, and I really (p. 18) don't remember the month.

Q. I'm sorry. If Tony told us it was June of '85, you would have no argument with that?

A. No. No, none at all.

Q. And that would be almost exactly two years after you allegedly heard this statement from Mr. Fulminante; is that correct?

A. Correct.

Q. Well, you've just told the Jury how sick and how upset you became when you heard these terrible things from Mr. Fulminante?

A. Correct.

Q. What did you do about it in May of '83?

A. Nothing.

Q. And what did you do about it in June, July, August, September, October, November, December of '83?

A. Mr. Koopman, there is no reason for you to yell at me.

Q. I'm not yelling at you.

A. You are. You are.

THE COURT: Mr. Koopman, that's correct, and there is no need to yell or raise your voice.

MR. KOOPMAN: I apologize, Your Honor.

THE WITNESS: Thank you, Your Honor.

THE COURT: Ma'am, you don't need to thank (p. 19) me. I'll be responsible for maintaining decorum in the courtroom. You answer the questions he asks, and wait until the questions are completely finished so that you do not clip off the ends, and answer the questions.

Q. BY MR. KOOPMAN: How about the remainder of 1983, who did you tell about this?

A. Nobody.

Q. How about all of '84, who did you tell about this?

A. Nobody.

Q. How about up until June of '85, who did you tell about this?

A. Nobody.

Q. Did you ever see Mr. Fulminante again after that first trip down to Pennsylvania?

A. Yes, sir.

Q. When was that?

A. Once. One more time, Anthony had to pick him up in Pennsylvania and he asked me to please take the ride with him, and I did.

Q. And you drove with him from Pennsylvania back up to New York?

A. Yes, sir.

Q. I thought you found this man very offensive, very distasteful, did you not?

(p. 20) A. Yes, I did, sir.

Q. Did Tony tell you when up went down to Pennsylvania the second time that you were going to be picking Red up?

A. Yes, sir.

Q. Did you ever say to him, "Gee, I don't want to ride with that guy"?

A. Yes, sir.

Q. Why didn't you stay home?

A. Because I didn't want Anthony driving in the car with him alone.

Q. Oh, I see. Looks like he might be dangerous to Anthony?

A. Yes, sir.

Q. Tell me, did you have any discussions with Anthony about the alleged remarks that Mr. Fulminante made to you that day?

A. After we had dropped him off?

Q. Uh-huh.

A. Yes.

Q. What did you tell him?

A. I didn't - I told him I didn't understand how he could have anything to do with a person like that.

Q. Okay. And did you suggest to him that, you know, maybe he ought to drop an anonymous letter to (p. 21) somebody, or maybe tell Walter Ticano from the FBI? Did you ever suggest that to Tony?

A. I did not know Walter Ticano from the FBI at that time, sir. That is -

Q. Did there come a time when you did become aware of Walter Ticano, isn't that true?

A. Yes, sir.

Q. And when would that have been?

A. That was right before Tony went onto the Federal Witness Program.

Q. September of '84?

A. Yes. No. I'm sorry, yes, it was in September.

Q. September of '84?

A. Yes.

Q. Did you have any conversations with Walter Ticano yourself prior to September of '84 when you went into the Witness Protective Program?

A. I did not go into the program in September of '84. I had no conversations with Walter Ticano until after that.

Q. Okay. When did you have your conversations with Walter Ticano?

A. My conversations with Walter Ticano started in October of 1984 when I had been waiting to get onto (p. 22) that program, trying to find what was taking so long.

Q. But you did talk to Walter at that time?

A. About getting onto the program, yes.

Q. From October of '84, through June of '85, did you ever tell Walter Ticano that you had heard Mr. Fulminante make these statements to you in that car?

A. No, sir, I did not.

THE COURT: Wait until he's completely finished with the question and then -

THE WITNESS: I'm sorry.

THE COURT: All right. And then take a breath and then answer it.

Q. BY MR. KOOPMAN: Now, let's go back to what he allegedly told you. by the way, they picked you up in Brooklyn, did they not?

A. Yes.

Q. Do you remember how you got to Pennsylvania, what direction you went?

A. Oh, we got on the Bell Parkway and over the Farazano Bridge and the highway that goes through

Staten Island; and from there, I really don't know the names of the roads.

Q. Okay. How long did it take you to get from Brooklyn onto the Jersey Turnpike approximately?

A. I'd say between a half hour, 45 minutes; (p. 23) somewhere around there.

Q. All right. When did this conversation take place between you and Red?

A. It was about half way through the trip down to Pennsylvania.

Q. Okay. Was he talking to Tony. Red, was he talking to Tony?

A. At different parts of the - different parts of the drive, yes.

Q. But the conversation concerning the death of the little girl took place only with you; is that correct?

A. Yes. Well, I was asking questions and he was answering them.

Q. Okay. And Tony did not cut in or add anything during that conversation, did he?

A. No, sir.

Q. All right. Now, you said as part of it, I believe that he said that he raped her?

A. Yes, sir.

Q. Is that the words he used?

A. Yes, sir.

Q. Did he ever say, "I made her give me head"?

A. No, sir.

Q. He said rape?

(p. 24) A. Yes, sir.

Q. And then he said, I believe your terminology was - you gave a quote, and if I misquote you, it's because I was trying to write down - choked her until the breath was out of her, or words to that effect?

A. The exact quote is, "he choked her until he thought he had choked every last breath of air out of her."

Q. And he also mentioned torturing her prior to killing her?

A. Yes.

Q. And then he shot her in the head to make sure she was dead; is that correct?

A. Yes. Yes, sir.

Q. Okay. Now, when Tony apparently was interviewed by the Phoenix authorities in August of '84, a year before you were then questioned by the Phoenix authorities, did you discuss with Tony at that time what he was doing out of town to talk to the Phoenix people?

A. No, I did not.

Q. Okay. In fact, Mrs. Sarivola, isn't it a fact that you - you recall my interview of you on October 22nd, 1985, in Houston, Texas - Dallas?

A. Dallas.

(p. 25) Q. Dallas, Texas?

A. Yes, sir.

Q. Okay. Do you recall telling me at that time that that was the first time that you knew that Tony was a paid, confidential informant for the FBI?

A. Yes, sir.

Q. And so from whenever he went to work for the FBI until October of this year, just a month and a half ago, you didn't even know he was giving information to the FBI; is that correct?

A. That is correct.

Q. Well, did you get into the program in October of '84?

A. No.

Q. When did you get into the program?

A. March of '85.

Q. Okay. Well, were you and Tony still living together?

A. When, sir, at what time?

Q. Between September of '84 and March of '85, did you and Tony reside together?

A. September, October, and November of 1984, no, because Tony was on the program at that time. They were waiting for my papers to come through. Tony then came back to New York, and yes, we did reside together.

(p. 26) That's why I had asked you at what time.

Q. From December to March?

A. Right, until we got back on the program, yes, sir.

Q. And then you got back into the program or you finally were accepted?

A. No, then we both got back and we both had to be reaccepted.

Q. And - okay. And that was March of '85?

A. Yes, sir.

* * *

(p. 28) Q. Okay. Now, you say that you received a call from Tony to you where this - where you refreshed his recollection about your overhearing - or your conversation with Red; is that correct?

A. Yes, sir.

Q. And where did that call come from?

A. Tony had been in Lexington, Kentucky, on a meeting.

Q. Okay. Now, when he talked to you on the phone, what did he tell you that all of a sudden you can (p. 29) recall this conversation that you had had two years prior?

A. Okay. When Tony goes on meetings, I usually don't ask him prior to his leaving who the meetings are with. In fact, he usually did not know - doesn't know.

When he called me from the meeting, I had asked him who was there. And he told me the guys from

Phoenix having to do with Red. And that's when I said to him, "Hey, do you remember the conversation that Red and I had had on that Pennsylvania drive?"

Q. And he said, "Oh, yeah, I remember that now;" is that correct, or words to that effect?

A. No. Well, he had said that he had forgotten about it, yes.

Q. And then what did he say to you?

A. He had Charlie Bernardo with him. That's Walt Ticano's partner. He had asked me if it would be okay if he told Mr. Scull about the conversation because he didn't know if I would want to get involved or if he would want me to get involved.

Q. Okay.

A. And I had told him, "Yes, by all means, tell Mr. Scull."

* * *

(p. 31) Q. Right. After this telephone conversation that you had with Tony in June of '85, up until you then talked with K. C. and Officer Jones in August of '85, did you and Tony discuss Red?

A. Did we discuss Red?

Q. Uh-huh.

A. No, sir, we didn't.

Q. Did you discuss the conversation that you had had with Red?

A. No, we did not.

Q. When Tony got back to wherever you were, did he say anything about his conversations with Mr. Scull or Mr. Jones or any other representative of Phoenix Police Department - I'm sorry, Mesa Police Department, or anything?

A. The only thing he said was that we shouldn't discuss it because everybody would want to see what I could remember myself.

Q. Okay. And, of course, because he told you that, the two of you just didn't talk about it?

(p. 32) A. I cannot say that it never came up. I'm sure I passed remarks. We never sat down and just had a conversation about it.

Q. By the way, being in this Protected Witness Program is very important for Tony, isn't it?

A. I consider it to be.

Q. Excuse me?

A. I consider it to be.

Q. Okay. And, of course, part of the agreement with the government is, if they find out that he lies to them about any investigation, the deal is withdrawn; is that correct?

A. Yes, sir.

* * *

(p. 46) MARK JONES,

called as a witness herein, having been previously duly sworn, was examined and testified as follows:

* * *

(p. 68) RECROSS-EXAMINATION

BY MR. KOOPMAN:

* * *

(p. 69) Q. Did you ever receive any information from the FBI, either through written or oral reports, prior to your interview of Mr. Sarivola in August of '85 - '84, in which the words rape, or give head, or torture, or strangulation, or choked were used?

A. No, sir, I did not.

Q. In August of 1984 - do you have that report?

A. Yes, sir. I'm at that report now.

Q. Okay. Is that a true and correct report?

A. Yes, sir, it is.

Q. In fact, as I recall, early on in my original cross-examination of you, we made a determination that you tried to write your reports as accurately and as truthfully as possible; is that correct?

A. Yes, sir, that's correct.

Q. All right. Now, do you recall in August of '84 when you interviewed Sarivola, talking to him about his prior police experience?

A. Yes, sir, I do.

Q. And do you recall or - you have your report in front of you; is that correct?

A. Yes, sir, I do.

(p. 70) Q. I'd like for you to turn to page 6 of that report.

A. Yes, sir. I'm at page 6.

Q. Okay. Well, you know what part I'm going to go to, don't you?

A. Yes, sir, I do.

Q. All right. In your report, does it say at one point "had served as a police officer with the Seagate Harbor Police, 3600 Surf Avenue, Brooklyn, New York, Sarivola said or stated that he was in the service of that police department for approximately four years and during that time had received 15 meritorious awards." Is that in your report?

A. Yes, sir, it is.

Q. And that's - your reports are true and accurate recollections of your interview; is that correct?

A. That's correct.

Q. Okay. Now, in that particular interview, if you would just go through it, did Mr. Sarivola in August of '84, say to you that Jeneane Hunt or the little girl had been raped by Fulminante prior to his killing her?

A. No, sir, he did not.

Q. Did he say to you in August of '84 that Fulminante had said that he had forced the little girl to (p. 71) give him head before he killed her?

A. No, sir, he did not.

Q. Did he, in August of '84, indicate to you that Mr. Fulminante had said that he had choked or strangled her prior to killing her?

A. No, sir, he did not.

Q. Did he, did Sarivola in 1984, indicate to you that the little girl had been tortured or made to beg for her life before she was killed?

A. No, sir, he did not.

* * *

(p. 72) Q. Okay. And in there it says, "Sarivola stated that Fulminante did not mention the name brand of the gun but when he talked about changing the gun's barrel, he felt it had to be a Dan Wesson," is that correct, is that a correct statement?

A. Yes, sir, that is.

Q. Okay. Up toward the top of that page when you were talking to Sarivola, did he indicate to you at that point in time that he considered and that others at the prison considered Mr. Fulminante a liar and a storyteller?

A. Yes, sir.

* * *

IN THE SUPERIOR COURT OF THE STATE OF
ARIZONA IN AND FOR THE COUNTY OF MARICOPA
THE STATE OF ARIZONA,)
Plaintiff,)
vs.) CR-142821
ORESTE C. FULMINANTE,)
Defendant.)

Phoenix, Arizona
December 16, 1985
10:36 o'clock p.m.

BEFORE: THE HONORABLE STEPHEN A. GERST,
JUDGE

Reporter's Transcript of Proceedings
Volume IX - Trial

* * *

(p. 47) THOMAS B. JARVIS,

called as a witness herein, having been first duly sworn,
was examined and testified as follows:

Direct Examination

BY MR. SCULL:

Q. Doctor, would you state your name and occupation for us, please?

A. My name is Thomas B. Jarvis. I'm a physician and I'm Deputy Chief Medical Examiner for Maricopa County.

* * *

(p. 54) Q. BY MR. SCULL: All right. I sorry to (p. 55) interrupt you, but I thought that might be a good time to put that in. Now, you made some other findings, I assume?

A. Those were the major findings. There were some minor things that should be mentioned. There was dried blood that streamed down over the right cheek apparently from the exit wound in front of the right ear in this direction (indicating).

There were some abrasions on the left forehead here that appeared to have occurred after death from lying on the ground. There was a ligature around the neck and it was tied but there was not any compression of the neck and I don't think it had anything to do with the death, but there it was. It doesn't have anything to do with the death because it was not tight. I don't know what it was there for.

And because apparently of combined effects of decomposition and animal activity, the right forearm and the right hand were absent and I don't know what happened to them.

* * *

(p. 59) Q. All right. Did you also have swabs from the body checked for spermatozoa and seminal fluid?

(p. 60) A. Yes, sir.

Q. And what were the results of those tests?

A. The sources of these swabs were the vagina and the mouth, and the pharynx and the rectum and they were all negative both for spermatozoa and seminal fluid.

Q. All right. Do you have any expert or medical opinion as to how long spermatozoa would live in the subject to an environment of say 48 hours in the desert?

A. I would like to say it this way, if I may, that the general experience in this area is so varied that it's very difficult to have an opinion as to how long sperm or seminal fluid will persist.

My own personal experience, which spans about 28 years, is that it's quite variable but that it's rare to find seminal fluid or sperm in a decomposing female body even when you suspect that it ought to be there. And I don't believe that the material persists very long. But, it's - that's a pretty speculative position I have taken and I would not want to take any stronger position than what I have just said.

* * *

IN THE SUPERIOR COURT OF THE STATE OF
ARIZONA IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA,)

Plaintiff,)

vs.)

CR-142821

ORESTE C. FULMINANTE,)

Defendant.)

Phoenix, Arizona
December 17, 1986
10:45 o'clock a.m.

BEFORE: THE HONORABLE STEPHEN A. GERST,
JUDGE

Reporter's Transcript of Proceedings
Volume X - Trial

* * * *

(p. 36) DAN BARKER,
called as a witness herein, having been first duly sworn,
was examined and testified as follows:

DIRECT EXAMINATION
BY MR. KOOPMAN:

Q. Mr. Barker, will you please give your present occupation to the Jury?

A. As of yesterday, I'm the new constable for the Peoria Justice Court District.

Q. And prior to getting that job, where did you work, sir?

A. As an investigator for the County Attorney's office.

* * *

(p. 37) Q. Okay. And during the course of this investigation, were you assisting Mr. Scull in his investigation for preparation for trial in this case?

A. Yes, I did.

Q. And as part of that function, sir, did you have occasion to interview Mr. Anthony Sarivola on or about June 17th, 1985?

A. I believe the date is wrong, unless I'm mistaken.

Q. Well, do you have your copy of that report?

A. Yes, if I may.

Q. Sure.

A. No, the interview took place May 20th and 21st, 1985.

Q. Okay. And the date, June 17th was the date that you typed this up?

(p. 38) A. Yes.

Q. Or had it typed up?

A. Yes.

Q. Okay. Did you take notes of that interview?

A. Yes.

Q. Was that the first time that you interviewed Mr. Sarivola?

A. Yes.

Q. Now, I'd like you to turn to page 3, starting with the bottom sentence, the last sentence.

A. The last complete sentence?

Q. No, where it says "Sarivola does not."

A. Okay.

Q. Would you please read that entire sentence to the Court.

A. "Sarivola does not recall Red mentioning hitting the girl, binding her, or sexually molesting her prior to killing her."

Q. And that was in May of '85?

A. Yes.

Q. Okay. When he said "Red" who was he referring to?

A. The Defendant, Oreste Fulminante.

Q. All right. How did this particular information come out? Did you ask him specifically, "Did (p. 39) Red tell you he hit the girl prior to killing her," or was it general conversation?

A. I think it was general conversation. I don't recall whether myself or Mr. Scull brought this up and asked him the questions.

Q. Okay. But, you do specifically recall him saying Red did not mention hitting the girl?

A. As I have written there, he could not recall Red saying any of these things as against Red did not say these things.

* * *

IN THE SUPERIOR COURT OF THE STATE OF
ARIZONA IN AND FOR THE
COUNTY OF MARICOPA

STATE OF ARIZONA,)
Plaintiff,) CR 142821
vs.) SPECIAL
ORESTE CHARLES FULMINANTE,) VERDICT
JR.,)
Defendant.)

There were additional statements made by the Defendant to the Sarivolas wherein he stated that he made the child commit an act of oral sex on him and that he raped her.

The Court finds such statements were, in fact, made by the Defendant, however, there is no independent corroboration of the statements relating to sexual misconduct from any of the findings of the medical examiner or the physical evidence produced at trial.

The Court finds that the possibility of sexual misconduct exists but the evidence is inconclusive and not beyond a reasonable doubt.

The statements attributed to the Defendant regarding acts of sexual misconduct are not, therefore, being considered on the issue of cruelty. Such statements are, however, being considered on the issue of whether the crime was committed with a heinous and depraved state of mind.

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

STATE OF ARIZONA,) NO.
Appellee,) CR-86-0053-AP
-vs-) MARICOPA
ORESTE C. FULMINANTE,) COUNTY
Appellant.) SUPERIOR
) COURT
) NO. CR-142821

APPELLEE'S ANSWERING BRIEF

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STATEMENT OF THE CASE

Although the police suspected appellant of murdering Jeneane, they did not have enough evidence to charge him with that offense. Detective Jones did find out during his investigation of the case that appellant had a 1971 conviction for passing bad checks in the state of New Jersey. Detective Jones and his fellow detectives passed

that information on to the federal authorities in the Alcohol, Tobacco and Firearms Bureau. (R.T. of Dec. 10, 1985, at 45-46).

In 1983, appellant was convicted of possession of a firearm by a felon. Appellant was sent to Raybrook Federal Correctional Institution in the state of New York to serve a prison term for that offense. (R.T. of Dec. 10, 1985, at 73.) While in prison, appellant became friendly with another inmate, Anthony Sarivola. Sarivola had been involved with organized crime for a number of years, and was serving a 60-day sentence for extortion. (R.T. of Dec. 11, 1985, at 8-11.) Prior to going to Raybrook, Sarivola had become a paid informant for the Federal Bureau of Investigation. While in Raybrook, he masqueraded as an organized crime figure. (*Id.* at 12.)

After Sarivola and appellant became friends, Sarivola heard a rumor that appellant was suspected of killing a child in Arizona. (*Id.* at 14-15). He asked appellant about the rumor, and appellant denied that it was true. (*Id.* at 15-16.) Sarivola told his contact in the F.B.I., Agent Walter Ticano, about the rumor. Agent Ticano told Sarivola to find out more about it. (*Id.* at 16.) Appellant had been receiving tough treatment from the other inmates, so Sarivola told appellant that he had to tell him the truth in order for Sarivola to give him any help. (*Id.* at 17-18.) Appellant then admitted to Sarivola that he had taken his stepdaughter, Jeneane, out to the desert on his motorcycle, and that he then shot her two times in the head with his .357 revolver. Appellant said he did it because Jeneane was a little bitch who was always in his way with his wife. Appellant told Sarivola that he choked Jeneane and made her beg a little before shooting her. He also claimed

he forced Jeneane to perform oral sex on him. (*Id.* at 18-20.) Appellant told Sarivola that he hid the murder weapon somewhere in a pile of rocks at the murder scene. (*Id.* at 20-22.)

ARGUMENTS

I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT A GOVERNMENT AGENT DID NOT VIOLATE APPELLANT'S FIFTH AMENDMENT RIGHTS WHEN HE INTERROGATED APPELLANT.

In the present case, appellant was incarcerated in Raybrook Prison in the State of New York on a federal weapons charge. Anthony Sarivola, a paid confidential informant for the Federal Bureau of Investigation, was incarcerated in Raybrook at the same time appellant was there. Sarivola heard rumors that appellant had killed his stepdaughter in Arizona. Appellant denied that the rumors were true. Sarivola passed the rumors on to Agent Walter Ticano of the F.B.I. Agent Ticano told Sarivola that, since it was just a rumor, Sarivola would have to find out more about it before Agent Ticano could act on it. Sarivola recontacted appellant and asked him again if the rumors were true. He told appellant that he might be in a position to help protect appellant from physical recriminations in prison, but that appellant must tell him the truth. Appellant then told Sarivola that he had killed his stepdaughter in Arizona. He recounted in detail the

circumstances of the killing. (Response to Motion to Suppress, filed Oct. 30, 1985, at 1-2.)

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